Maysie Long & Anor v Rahimah bt Mohd Noor & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCvC)(W)-572–04 OF 2022
VAZEER ALAM MYDIN, MARIANA YAHYA AND WONG KIAN KHEONG JJCA
21 SEPTEMBER 2023

Land Law — Indefeasibility of title — Fraud — Recovery of land — Plaintiffs were owners of land — Plaintiffs alleged that first to fifth defendants committed fraud which led to transfer of plaintiffs' land to sixth and seventh defendants — Plaintiffs filed actions for declarations that power of attorney ('PA'), sale and purchase agreement ('SPA') and memorandum of transfer ('MOT') were null and void — Whether High Court could rely on judgment in default of defence against first to fifth defendants to declare PA invalid — Whether sixth and seventh defendants breached High Court's order in relation to stay of dealing — Whether sixth and seventh defendants parties or privy to fraud within meaning of s 340(2)(a) of National Land Code — Whether plaintiffs could allege that SPA invalid and MOT 'insufficient' and/or 'void' instrument' under s 340(2)(b) of National Land Code — Whether first defendant could dispute authority of second and third defendants as its former directors to sign SPA and MOT on first defendant's behalf — Whether sixth and seventh defendants could rely on Indoor Management Rule or rule in Turquand's case — Whether sixth and seventh defendants were required by law to inquire on whether second and third defendants had actual authority from first defendant to sign SPA and MOT on behalf of first defendant — Whether High Court could rely on opinion of officer of land office to interpret statutes — Whether plaintiffs could invalidate PA, SPA and MOT — Whether plaintiffs' original action time-barred — Whether High Court's decision that damages payable by plaintiffs to sixth and seventh defendants were lawfully made — Whether High Court should grant declarations in favour of plaintiffs

The plaintiffs were the owners of a piece of land located in Kuala Lumpur ('the land') which was the subject matter of the present appeal. The second and third defendants were the directors of the first defendant before they resigned and being replaced by the fourth and fifth defendants. The sixth and seventh defendants were the subsequent purchasers of the land. The chronology of the case started with a proposed joint venture in an offshore business between the fourth plaintiff's husband ('PW1') as the managing director of a company known as Emerald Graphics Sdn Bhd and the fourth defendant as the director of a company known as Firewall Technologies (M) Sdn Bhd. In the process of obtaining financing for the joint venture proposal, the plaintiffs had agreed to use the land as security for the loan provided by the second and third

defendants as the directors of the first defendant. To this end, the plaintiffs had executed a power of attorney ('the PA') for the benefits of the first defendant. As events unfolded, after the second and third defendants resigned from the first defendant, they had executed a sale and purchase agreement ('the SPA') and memorandum of transfer ('the MOT') on behalf of the first defendant to sell the land whereby the land was transferred to the sixth and seventh defendants. The first defendant had also taken the relevant steps to purchase the said land from the plaintiffs, but the transaction could not be completed because the first defendant failed to make the relevant payment. When the plaintiffs discovered via a land search that the land had already been transferred to the sixth and seventh defendants, the plaintiff demanded the payment of the purchase price from the first to fifth defendants and subsequently entered a private caveat on the land (which was later removed by the Registrar of Titles). The plaintiffs then proceeded to file an action against the defendants premised on fraud ('the original action') and subsequently obtained a judgment in default of defence ('the default judgment') for, inter alia, a declaration that the PA, SPA and MOT was null and void and for an order that the sixth and seventh defendants to return the original Issue Document of Title ('the IDT') of the land to the plaintiffs. Pursuant to the default judgment, the land office had registered the plaintiffs as co-proprietors of the land. The plaintiffs did not serve the default judgment to the sixth and seventh defendants and when the latter found out about the default judgment, they obtained the High Court's order dated 25 May 2018 ('the HC's order') to set aside the default judgment but the said order also provided that any registration, endorsement or entry regarding any dealing in respect of the land shall be stayed until final disposal of the case. Despite the HC's order on the stay of dealing, the sixth and seventh defendants had presented the HC's order to the land office to obtain reinstatement of the registration of the sixth and seventh defendants as co-proprietors of the land ('the title reinstatement'). Pursuant to the HC's order in setting aside the default judgment against the sixth and seventh defendants, the latter proceeded with their defence and counterclaim for, inter alia, a declaration that the registration of the plaintiffs as co-proprietors pursuant to the default judgment was void and an order that the transfer of the land to the plaintiffs to be set aside. At the end of the trial, the learned judicial commissioner ('the JC') allowed the plaintiffs' claim and set aside the defendants' counterclaim ('the HC's decision'). The learned JC relied on the default judgment against the first to fifth defendants to decide that the PA was invalid. In this regard, the learned JC found that the first to fifth defendants had committed fraud on the plaintiffs which led to the transfer of the land from the plaintiffs to the sixth and seventh defendants. The learned JC had also relied on s 40 of the Specific Relief Act 1950 ('the SRA') and ordered the plaintiffs to pay damages to the sixth and seventh defendants. Aggrieved by the decision, the defendants filed the present appeal. The issues to be determined by the court were: (a) whether the High Court could rely on the default judgment against the first to fifth defendants to declare the PA to be invalid; (b) whether the sixth and seventh defendants had

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breached the HC's order dated 25 May 2018; (c) whether the sixth and seventh defendants were parties or privy to the fraud within the meaning of s 340(2)(a) of the National Land Code ('the NLC'); (d) whether the plaintiffs could allege that the SPA was invalid and the MOT was an 'insufficient' and/or 'void' instrument' under s 340(2)(b) of the NLC ('causes of action (invalid SPA/insufficient and void MOT') when: (i) it was not pleaded by the plaintiffs in the statement of claim ('the SOC'); (ii) it was not stated in the summary of the plaintiffs' case; and (iii) it was not raised in the plaintiffs' two issues to be tried; (e) whether the first defendant could dispute the authority of the second and third defendants to sign the SPA and MOT on the first defendant's behalf; (f) whether the sixth and seventh defendants could rely on Indoor Management Rule or the rule in *Turquand*'s case; (g) whether the sixth and seventh defendants were required by law to inquire on whether the second and third defendants had actual authority from the first defendant to sign the SPA and MOT on behalf of the first defendant; (h) whether the High Court could rely on the opinion of the officer of the Kuala Lumpur land office ('PW5'); (i) whether the plaintiffs could invalidate the PA, SPA and MOT; (j) whether the original action was time-barred; (k) whether the High Court's decision that damages were payable by the plaintiffs to the sixth and seventh defendants were lawfully made; and (l) whether the High Court should grant declarations in favour of the plaintiffs.

Held, setting aside the HC's decision, dismissing the original action, and allowing the counterclaim with costs of RM80,000 here and below to be paid by the plaintiffs to the sixth and seventh defendants subject to allocatur fee:

(1) The learned JC had erred in law when Her Ladyship relied on the default judgment against the first to fifth defendants to decide that the PA was invalid as against the sixth and seventh defendants ('the first legal error'). This was because, pursuant to s 42 of the SRA, the said default judgment only bound the first to fifth defendants and had no effect on the sixth and seventh defendants. In addition, the learned JC's reliance on the default judgment against the first to fifth defendants on the sixth and seventh defendants was contrary to the HC's order dated 25 May 2018 which had set aside the default judgment against the sixth and seventh defendants (see para 64).

(2) The court could not comprehend how the sixth and seventh defendants had breached the HC's order dated 25 May 2018, in particular its para 6, by obtaining the title reinstatement. Further, the plaintiffs did not apply to the learned JC to cite the sixth and seventh defendants for contempt of court in respect of the alleged breach of para 6 of the said order. In any event, even if the breach of the said order had been committed by the sixth and seventh defendants, by any measure the breach could not be lawful ground for the learned JC to allow the original action and to dismiss the counterclaim ('the second legal error'). This was because

except for setting aside the default judgment against the sixth and seventh defendants, the said order had no bearing on the outcome of the original action and counterclaim (see para 65). A

(3) The sixth and seventh defendants were immediate co-purchasers of the land and upon the MOT's registration on 27 October 2004, the registered title of the sixth and seventh defendants had deferred indefeasibility (not immediate indefeasibility) and such title could only be defeasible upon proof of any of the exceptions under s 340(2) of the NLC by the plaintiffs (see para 70). B

(4) The word 'fraud' in s 340(2)(a) of the NLC meant 'actual fraud' and not 'equitable fraud' or 'constructive fraud'. In the present case, the sixth and seventh defendants did not commit the actual fraud, instead such fraud was committed by the first to fifth defendants in view of the fact that they did not apply to set aside the default judgment against them. The learned JC had made an error of law in failing to decide the question of whether the sixth and seventh defendants were parties or privy to the fraud committed by the first to fifth defendants within the meaning of s 340(2)(a) of the NLC ('the third legal error'). The plaintiffs had not adduced any evidence to prove that the sixth and seventh defendants were parties to such fraud. In fact, the evidence showed that the sixth and seventh defendants had no actual knowledge of the fraud before the registration of the MOT. Based on the above reasons, the court was not persuaded that the plaintiffs had discharged the legal and evidential burden to prove on a balance of probabilities that the sixth and seventh defendants were privy to the fraud. In addition, based on the evidence, the plaintiffs and PW1 were guilty of, inter alia, inordinate delay and questionable conduct (see paras 72–79). C D E F

(5) In the present case, the plaintiffs admitted that they had signed the PA on their own volition, as such, there was no room for the plaintiffs to invoke the forgery exception under s 340(2)(b) of the NLC (see para 81). G

(6) It was trite law that parties were bound by their pleadings. The SOC did not plead the causes of action (invalid SPA/insufficient and void MOT), as such, the learned JC should not have allowed the plaintiffs to rely on the said causes of action. The plaintiff could not rely on para 3 of their 'Reply to Defence and Defence to Counterclaim' ('RDDCC') to justify their reliance of the said causes of action because the function of RDDCC were merely to reply to the defence of the sixth and seventh defendants and to defend against the counterclaim. Further, the plaintiffs had also failed to make application under O 20 rr 5(1) and 8(1) of the Rules of Court 2012 ('the ROC') for leave of court to amend the SOC to include a pleading regarding the said causes of action, as such, the plaintiffs could not now be allowed to circumvent the requirements of O 20 rr 5(1) and 8(1) of the ROC by relying on the RDDCC. In addition H I

to the above, there were two other reasons why the learned JC should not have allowed the plaintiffs to rely on the said causes of action, firstly because it was not stated in the summary of the plaintiffs' case; and secondly, the plaintiffs' two issues to be tried did not allude to the said causes of action. Based on the above reasons, the learned JC had erred in law by allowing the plaintiffs to rely on the said causes of action ('the fourth legal error') (see paras 84–87).

(7) The first defendant could not have disputed the authority of the second and third defendants to sign the SPA and MOT on behalf of the first defendant because firstly, the first defendant's resolution had authorised the second and third defendants to sign the SPA and MOT on behalf of the first defendant, and secondly, the first defendant's common seal had been affixed on the SPA and MOT. The learned JC had committed a legal error when Her Ladyship omitted to take into account these reasons ('the fifth legal error') (see para 88).

(8) In respect to the land, as per the above findings, the sixth and seventh defendants were bona fide third parties who had dealt with the first defendant without any actual knowledge of the fraud committed by the first to fifth defendants. Consequently, the sixth and seventh defendants could rely on the Indoor Management Rule or the rule in *Turquand*'s case to assume that the second and third defendants had been authorised by the first defendant to sign the SPA and MOT on the first defendant's behalf. The failure of the learned JC to apply the Indoor Management Rule in this case, constituted an error of law ('the sixth legal error') (see para 89).

(9) For the purpose of the second scenario under s 340(2)(a) of the NLC ie, the actual fraud was caused by a third party and this then led to the registration of the immediate purchaser's registered title/interest, constructive notice or knowledge of the third party's actual fraud could not be imputed to the sixth and seventh defendants regarding the authority of the second and third defendants to execute the SPA and MOT on the first defendant's behalf. Consequently, the sixth and seventh defendants were not required by the NLC and our case law to inquire on: (a) whether the second and third defendants had actual authority from the first defendant to sign the SPA and MOT on behalf of the first defendant; and (b) whether the second and third defendants were directors of the first defendant when they executed the SPA and MOT on the first defendant's behalf (see para 90).

(10) The effect of the NLC and the Companies Act 1965 ('the CA') was a matter for the court to interpret and apply. No witness, including an advocate and solicitor, could testify under oath what was his or her opinion regarding the effect of the NLC and the CA. Therefore, there was

a clear error of law when the learned JC accepted PW5's opinion regarding the effect of the NLC and the CA ('the seventh legal error') (see para 91).

(11) The PA was duly executed and deposited in accordance with the Power of Attorney Act 1949 as such it was valid. Further, the SPA and MOT were also valid for the following reasons: (a) as explained above, the first defendant could not dispute the authority of the second and third defendants to execute the SPA and MOT on behalf of the first defendant; and (b) the sixth and seventh defendants were not required by law to inquire on whether the second and third defendants were the first defendant's directors when they executed the SPA and MOT on behalf of the first defendant. Therefore, the SPA and MOT could not be nullified under the insufficient or void instrument exception pursuant to s 340(2)(b) of the NLC. In addition, considering that the MOT was valid, the learned JC had no discretionary power under s 38(1) of the SRA to cancel the MOT and the HC's decision that damages were payable by the plaintiffs to the sixth and seventh defendants could not be made pursuant to s 40 of the SRA (see paras 92–94 & 98).

(12) The original action was not time-barred based on the following reasons: (a) one of the remedies sought in the original action was recovery of the land, as such, the 12-year limitation period to recover land as provided in s 9(1) of the Limitation Act 1953 ('the LA') applied to the original action; (b) even though the SOC had pleaded the tort of fraud, the six-year limitation period in s 6(1)(a) of the LA was subject to s 9(1) of the LA as was clear from the words 'Save as hereinafter provided' in s 6(1) of the LA; and (c) the original action was filed on 16 April 2013 and this was well within the 12-year limitation period which commenced from MOT's registration on 27 October 2004 (see para 96).

(13) It was not disputed that the court had a discretion to grant a declaration under s 41 of the SRA and O 15 r 16 of the ROC. In this case the learned JC had granted declarations in favour of the plaintiffs without any consideration of the inordinate delay and questionable conduct of the plaintiffs and PW1. An exercise of the learned JC's discretion to grant declarations in this case without taking into account the inordinate delay and questionable conduct of the plaintiffs and PW1 was tantamount to a legal error ('the eighth legal error') (see para 100).

[Bahasa Malaysia summary

Plaintif-plaintif adalah pemilik-pemilik sebidang tanah yang terletak di Kuala Lumpur ('tanah tersebut') yang menjadi subjek rayuan semasa. Defendan kedua dan ketiga merupakan pengarah-pengarah kepada defendan pertama sebelum mereka meletakkan jawatan dan digantikan oleh defendan keempat dan kelima. Defendan keenam dan ketujuh adalah pembeli berikutnya bagi

tanah tersebut. Kronologi kes bermula dengan cadangan usaha sama dalam perniagaan luar pesisir antara suami plaintif keempat ('PW1') sebagai pengarah urusan sebuah syarikat dikenali sebagai Emerald Graphics Sdn Bhd dan defendan keempat sebagai pengarah syarikat dikenali sebagai Firewall Technologies (M) Sdn Bhd. Dalam proses mendapatkan pembiayaan bagi cadangan usaha sama tersebut, plaintif-plaintif telah bersetuju untuk menggunakan tanah tersebut sebagai jaminan pinjaman yang diberikan oleh defendan kedua dan ketiga sebagai pengarah-pengarah defendan pertama. Untuk tujuan ini, plaintif-plaintif telah menandatangani surat kuasa wakil ('SW') untuk kepentingan defendan pertama. Setelah itu, selepas defendan kedua dan ketiga meletak jawatan daripada defendan pertama, mereka telah menandatangani perjanjian jual beli ('PJB') dan memorandum pemindahan ('MP') bagi pihak defendan pertama untuk menjual tanah tersebut yang mana tanah tersebut kemudiannya telah dipindahkan kepada defendan keenam dan ketujuh. Defendan pertama juga telah mengambil langkah-langkah yang relevan untuk membeli tanah tersebut daripada plaintif-plaintif, tetapi transaksi tersebut tidak dapat diselesaikan kerana defendan pertama gagal membuat pembayaran yang sepatutnya. Apabila plaintif-plaintif mendapati melalui carian tanah bahawa tanah tersebut telah pun dipindahkan kepada defendan keenam dan ketujuh, plaintif-plaintif menuntut pembayaran harga pembelian daripada defendan pertama hingga kelima dan seterusnya memasukkan kaveat persendirian ke atas tanah tersebut (yang kemudiannya dikeluarkan oleh pendaftar tanah). Plaintif-plaintif kemudiannya meneruskan untuk memfailkan tindakan terhadap defendan-defendan berdasarkan fraud ('tindakan asal') dan kemudiannya memperoleh penghakiman ingkar pembelaan ('penghakiman ingkar tersebut') untuk, antara lain, pengisytiharan bahawa SW, PJB dan MP tersebut adalah terbatal dan tidak sah dan untuk perintah supaya defendan keenam dan ketujuh mengembalikan dokumen hakmilik terbitan asal ('DHT') bagi tanah tersebut kepada plaintif-plaintif. Berpandukan kepada penghakiman ingkar tersebut, pejabat tanah telah mendaftarkan plaintif-plaintif sebagai pemilik bersama tanah tersebut. Plaintif-plaintif tidak menyampaikan penghakiman ingkar tersebut kepada defendan keenam dan ketujuh dan apabila mereka mengetahui tentang penghakiman ingkar tersebut, mereka telah mendapatkan perintah Mahkamah Tinggi bertarikh 25 Mei 2018 ('perintah MT') untuk mengenepikan penghakiman ingkar tersebut tetapi perintah tersebut juga menyatakan bahawa apa-apa pendaftaran, pengendorsan atau kemasukan mengenai apa-apa urusan berkenaan dengan tanah tersebut hendaklah ditangguh sehingga pelupusan akhir kes tersebut. Walaupun dengan adanya perintah MT tersebut mengenai penangguhan urus niaga, defendan keenam dan ketujuh telah mengemukakan perintah MT tersebut kepada pejabat tanah untuk mendapatkan pengembalian semula pendaftaran defendan keenam dan ketujuh sebagai pemilik bersama tanah tersebut ('pengembalian semula hak milik'). Berdasarkan kepada perintah MT yang telah mengenepikan penghakiman ingkar terhadap defendan keenam dan ketujuh, defendan

keenam dan ketujuh meneruskan pembelaan dan tuntutan balas mereka untuk, antara lain, pengisytiharan bahawa pendaftaran plaintif-plaintif sebagai pemilik bersama menurut penghakiman ingkar tersebut adalah tidak sah dan perintah supaya pemindahan tanah kepada plaintif-plaintif diketepikan. Pada akhir perbicaraan, pesuruhjaya kehakiman yang bijaksana ('PK') membenarkan tuntutan plaintif-plaintif dan mengenepikan tuntutan balas defendan-defendan ('keputusan MT'). Pesuruhjaya kehakiman yang bijaksana bergantung kepada penghakiman ingkar terhadap defendan pertama hingga kelima untuk memutuskan bahawa SW tersebut adalah tidak sah. Dalam hal ini, PK yang bijaksana mendapati defendan pertama hingga kelima telah melakukan fraud ke atas plaintif-plaintif yang membawa kepada pemindahan tanah tersebut daripada plaintif-plaintif kepada defendan keenam dan ketujuh. Pesuruhjaya kehakiman yang bijaksana juga telah bergantung pada s 40 Akta Relief Spesifik 1950 ('ARS') dan memerintahkan plaintif-plaintif membayar ganti rugi kepada defendan keenam dan ketujuh. Terkilan dengan keputusan tersebut, defendan-defendan memfailkan rayuan semasa. Isu-isu yang perlu ditentukan oleh mahkamah ialah: (a) sama ada Mahkamah Tinggi boleh bergantung kepada penghakiman ingkar terhadap defendan pertama hingga kelima untuk mengisytiharkan SW tersebut sebagai tidak sah; (b) sama ada defendan keenam dan ketujuh telah melanggar perintah MT bertarikh 25 Mei 2018; (c) sama ada defendan keenam dan ketujuh adalah pihak atau mengetahui tentang fraud tersebut berdasarkan pengertian s 340(2)(a) Kanun Tanah Negara ('KTN'); (d) sama ada plaintif-plaintif boleh mendakwa bahawa PJB tersebut adalah tidak sah dan MP tersebut adalah instrumen 'tidak mencukupi' dan/atau 'tidak sah' di bawah s 340(2)(b) KTN ('kausa tindakan (PJB tidak sah/ MP tidak mencukupi dan tidak sah') apabila: (i) ia tidak diplid oleh plaintif-plaintif dalam pernyataan tuntutan ('PT'); (ii) ia tidak dinyatakan dalam ringkasan kes plaintif-plaintif; dan (iii) ia tidak dibangkitkan dalam dua isu plaintif-plaintif untuk dibicarakan; (e) sama ada defendan pertama boleh mempertikaikan kuasa defendan kedua dan ketiga untuk menandatangani PJB dan MP bagi pihak defendan pertama; (f) sama ada defendan keenam dan defendan ketujuh boleh bergantung pada Peraturan Pengurusan Dalaman atau peraturan dalam kes *Turquand*; (g) sama ada defendan keenam dan ketujuh dikehendaki oleh undang-undang untuk menyiasat sama ada defendan kedua dan ketiga mempunyai kuasa sebenar daripada defendan pertama untuk menandatangani PJB dan MP bagi pihak defendan pertama; (h) sama ada Mahkamah Tinggi boleh bergantung kepada pendapat pegawai pejabat tanah Kuala Lumpur ('PW5'); (i) sama ada plaintif-plaintif boleh membatalkan SW, PJB dan MP tersebut; (j) sama ada tindakan asal tersebut terhalang oleh had masa; (k) sama ada keputusan Mahkamah Tinggi bahawa ganti rugi perlu dibayar oleh plaintif-plaintif kepada defendan keenam dan ketujuh telah dibuat secara sah; dan (l) sama ada Mahkamah Tinggi patut memberikan pengisytiharan yang memihak kepada plaintif-plaintif.

Diputuskan, mengenepikan keputusan MT, menolak tindakan asal dan

membenarkan tuntutan balas dengan kos sebanyak RM80,000 di sini dan di bawah dibayar oleh plaintif-plaintif kepada defendan keenam dan ketujuh tertakluk kepada fi alokatur:

(1) Pesuruhjaya kehakiman yang bijaksana telah terkhilaf dari segi undang-undang apabila Yang Arif bergantung pada penghakiman ingkar terhadap defendan pertama hingga kelima untuk memutuskan bahawa SW tersebut adalah tidak sah terhadap defendan keenam dan ketujuh ('kekhilafan undang-undang pertama'). Ini kerana, menurut s 42 ARS, penghakiman ingkar tersebut hanya mengikat defendan pertama hingga kelima dan tidak mempunyai kesan ke atas defendan keenam dan ketujuh. Di samping itu, pergantungan PK yang bijaksana dengan penghakiman ingkar terhadap defendan pertama hingga kelima terhadap defendan keenam dan ketujuh adalah bertentangan dengan perintah MT bertarikh 25 Mei 2018 yang telah mengenepikan penghakiman ingkar terhadap defendan keenam dan ketujuh (lihat perenggan 64).

(2) Mahkamah tidak dapat memahami bagaimana defendan keenam dan ketujuh telah melanggar perintah MT bertarikh 25 Mei 2018, khususnya perenggan 6, dengan mendapatkan pengembalian semula hak milik tersebut. Selanjutnya, plaintif-plaintif tidak memohon kepada PK yang bijaksana untuk menghukum defendan keenam dan ketujuh kerana menghina mahkamah berhubung dakwaan pelanggaran perenggan 6 perintah tersebut. Dalam apa jua keadaan, walaupun pelanggaran perintah tersebut telah dilakukan oleh defendan keenam dan ketujuh, namun langkah pelanggaran tersebut tidak boleh menjadi alasan yang sah bagi PK yang bijaksana untuk membenarkan tindakan asal dan menolak tuntutan balas ('kekhilafan undang-undang yang kedua'). Ini kerana, perintah tersebut tidak mempunyai kaitan dengan keputusan tindakan asal dan tuntutan balas kecuali untuk mengenepikan penghakiman ingkar terhadap defendan keenam dan ketujuh (lihat perenggan 65).

(3) Defendan keenam dan ketujuh adalah pembeli bersama serta-merta tanah tersebut dan selepas pendaftaran MP pada 27 Oktober 2004, hak milik berdaftar defendan keenam dan ketujuh mempunyai ketidakbolehsangkalan tertunda (bukan ketidakbolehsangkalan serta-merta) dan hak milik tersebut hanya boleh disangkal dengan pembuktian mana-mana pengecualian di bawah s 340(2) KTN oleh plaintif-plaintif (lihat perenggan 70).

(4) Perkataan 'fraud' dalam s 340(2)(a) KTN bermaksud 'fraud sebenar' dan bukan 'fraud saksama' atau 'fraud konstruktif'. Dalam kes ini, defendan keenam dan ketujuh tidak melakukan fraud sebenar, sebaliknya fraud tersebut dilakukan oleh defendan pertama hingga kelima mengambil kira fakta bahawa mereka tidak memohon untuk mengenepikan penghakiman ingkar terhadap mereka. Pesuruhjaya kehakiman yang

bijaksana telah melakukan kekhilafan undang-undang kerana gagal memutuskan persoalan sama ada defendan keenam dan ketujuh adalah pihak atau mempunyai pengetahuan tentang fraud yang dilakukan oleh defendan pertama hingga kelima dalam pengertian s 340(2)(a) KTN ('kekhilafan undang-undang ketiga'). Plaintif-plaintif tidak mengemukakan apa-apa keterangan untuk membuktikan bahawa defendan keenam dan ketujuh adalah pihak yang terlibat dalam fraud tersebut. Malah, keterangan menunjukkan defendan keenam dan ketujuh tidak mempunyai pengetahuan sebenar tentang fraud tersebut sebelum pendaftaran MP. Berdasarkan alasan-alasan di atas, mahkamah tidak diyakinkan bahawa plaintif-plaintif telah melepaskan beban undang-undang dan keterangan untuk membuktikan atas imbangan kebarangkalian bahawa defendan keenam dan ketujuh mengetahui tentang fraud tersebut. Di samping itu, berdasarkan keterangan, plaintif-plaintif dan PW1 bersalah, antara lain, bagi kelewatan yang melampau dan kelakuan yang boleh dipersoalkan (lihat perenggan 72–79).

(5) Dalam kes ini, plaintif-plaintif mengakui bahawa mereka telah menandatangani SW tersebut atas kerelaan mereka sendiri, oleh itu, tiada ruang untuk plaintif-plaintif membangkitkan pengecualian pemalsuan di bawah s 340(2)(b) KTN (lihat perenggan 81).

(6) Sudah menjadi undang-undang yang mantap bahawa pihak-pihak terikat dengan pliding mereka. Pernyataan tuntutan tidak memplid kausa tindakan (PJB tidak sah/MP tidak mencukupi dan tidak sah), oleh itu, PK yang bijaksana tidak sepatutnya membenarkan plaintif-plaintif bergantung kepada kausa-kausa tindakan tersebut. Plaintif-plaintif tidak boleh bergantung pada perenggan 3 'Reply to Defence and Defence to Counterclaim' ('RDDCC') mereka untuk mewajarkan pergantungan mereka terhadap kausa-kausa tersebut kerana fungsi RDDCC hanyalah untuk membalas pembelaan pihak defendan keenam dan defendan ketujuh dan untuk membela terhadap tuntutan balas tersebut. Selanjutnya, plaintif-plaintif juga gagal membuat permohonan di bawah A 20 kk 5(1) dan 8(1) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') untuk kebenaran mahkamah meminda PT tersebut untuk memasukkan pliding berhubung kausa-kausa tindakan tersebut, oleh itu, plaintif-plaintif kini tidak boleh dibenarkan memintas keperluan A 20 kk 5(1) dan 8(1) KKM 2012 dengan bergantung kepada RDDCC tersebut. Sebagai tambahan kepada perkara di atas, terdapat dua sebab lain mengapa PK yang bijaksana tidak sepatutnya membenarkan plaintif-plaintif bergantung kepada kausa-kausa tindakan tersebut, pertama kerana ia tidak dinyatakan dalam ringkasan kes plaintif-plaintif; dan kedua, kedua-dua isu plaintif yang akan dibicarakan tidak merujuk kepada kausa-kausa tindakan tersebut. Berdasarkan sebab-sebab di atas, PK yang bijaksana telah terkhilaf dari segi undang-undang dengan

membenarkan plaintif-plaintif bergantung kepada kausa-kausa tindakan tersebut ('kekhilafan undang-undang keempat') (lihat perenggan 84–87).

(7) Defendan pertama tidak boleh mempertikaikan kuasa defendan kedua dan ketiga untuk menandatangani PJB dan MP tersebut bagi pihak defendan pertama kerana pertamanya, resolusi defendan pertama telah membenarkan defendan kedua dan ketiga menandatangani PJB dan MP tersebut bagi pihak defendan pertama, dan kedua, meterai rasmi defendan pertama telah dimeterai pada PJB dan MP tersebut. Pesuruhjaya kehakiman yang bijaksana telah melakukan kekhilafan undang-undang apabila Yang Arif tidak mengambil kira sebab-sebab ini ('kekhilafan undang-undang kelima').

(8) Berkenaan dengan tanah tersebut, berdasarkan dapatan-dapatan di atas, defendan keenam dan ketujuh adalah pihak ketiga yang bona fide yang telah berurusan dengan defendan pertama tanpa apa-apa pengetahuan sebenar tentang fraud yang dilakukan oleh defendan pertama hingga kelima. Akibatnya, defendan keenam dan ketujuh boleh bergantung kepada Peraturan Pengurusan Dalaman atau peraturan dalam kes *Turquand* untuk menganggap bahawa defendan kedua dan ketiga telah diberi kuasa oleh defendan pertama untuk menandatangani PJB dan MP bagi pihak defendan pertama. Kegagalan PK yang bijaksana untuk menggunakan Peraturan Pengurusan Dalaman dalam kes ini, merupakan kekhilafan undang-undang ('kekhilafan undang-undang keenam') (lihat perenggan 89).

(9) Bagi tujuan senario kedua di bawah s 340(2)(a) KTN iaitu, fraud sebenar disebabkan oleh pihak ketiga dan ini kemudiannya membawa kepada pendaftaran hakmilik/kepentingan berdaftar pembeli serta-merta, notis atau pengetahuan konstruktif tentang fraud sebenar pihak ketiga tidak boleh dipertanggungjawabkan kepada defendan keenam dan ketujuh mengenai kuasa defendan kedua dan ketiga untuk melaksanakan PJB dan MP tersebut bagi pihak defendan pertama. Akibatnya, defendan keenam dan ketujuh tidak dikehendaki oleh KTN dan undang-undang kes untuk menyiasat tentang: (a) sama ada defendan kedua dan ketiga mempunyai kuasa sebenar daripada defendan pertama untuk menandatangani PJB dan MP bagi pihak defendan pertama; dan (b) sama ada defendan kedua dan ketiga adalah pengarah-pengarah defendan pertama apabila mereka melaksanakan PJB dan MP bagi pihak defendan pertama (lihat perenggan 90).

(10) Kesan KTN dan Akta Syarikat 1965 ('AS') adalah perkara yang perlu ditafsir dan diguna pakai oleh mahkamah. Tiada saksi, termasuk peguam bela dan peguam cara, boleh memberi keterangan bersumpah mengenai pendapatnya mengenai kesan KTN dan AS. Oleh itu, terdapat kekhilafan undang-undang yang jelas apabila PK yang bijaksana

menerima pendapat PW5 berkenaan kesan KTN dan AS ('kekhilafan undang-undang ketujuh') (lihat perenggan 91).

(11) Surat kuasa wakil tersebut telah dilaksanakan dengan sewajarnya dan didepositkan mengikut Akta Surat Kuasa Wakil 1949 oleh itu ia adalah sah. Selanjutnya, PJB dan MP juga sah atas sebab-sebab berikut: (a) seperti yang dijelaskan di atas, defendan pertama tidak boleh mempertikaikan kuasa defendan kedua dan ketiga untuk melaksanakan PJB dan MP bagi pihak defendan pertama; dan (b) defendan keenam dan ketujuh tidak dikehendaki oleh undang-undang untuk menyiasat sama ada defendan kedua dan ketiga adalah pengarah-pengarah defendan pertama apabila mereka melaksanakan PJB dan MP bagi pihak defendan pertama. Oleh itu, PJB dan MP tersebut tidak boleh dibatalkan di bawah pengecualian instrumen tidak mencukupi atau tidak sah menurut s 340(2)(b) KTN. Di samping itu, memandangkan MP tersebut adalah sah, PK yang bijaksana tidak mempunyai kuasa budi bicara di bawah s 38(1) ARS untuk membatalkan MP dan keputusan MT bahawa ganti rugi perlu dibayar oleh plaintif-plaintif kepada defendan keenam dan ketujuh tidak boleh dibuat menurut s 40 ARS (lihat perenggan 92–94 & 98).

(12) Tindakan asal tidak terhalang oleh had masa berdasarkan sebab-sebab berikut: (a) salah satu remedi yang dimohon dalam tindakan asal ialah untuk mendapatkan semula tanah, oleh itu, tempoh had masa 12 tahun untuk mendapatkan semula tanah seperti yang diperuntukkan dalam s 9(1) Akta Had Masa 1953 ('AHM') terpakai untuk tindakan asal; (b) walaupun PT telah memplid tort fraud, tempoh had masa enam tahun dalam s 6(1)(a) AHM adalah tertakluk kepada s 9(1) AHM seperti yang jelas daripada perkataan 'Kecuali sebagaimana yang diperuntukkan kemudian daripada ini' dalam s 6(1) AHM; dan (c) tindakan asal telah difailkan pada 16 April 2013 dan ini adalah dalam tempoh had masa 12 tahun yang bermula dari pendaftaran MP pada 27 Oktober 2004 (lihat perenggan 96).

(13) Tidak dipertikaikan bahawa mahkamah mempunyai budi bicara untuk memberikan pengisytiharan di bawah s 41 ARS dan A 15 k 16 KKM 2012. Dalam kes ini, PK yang bijaksana telah memberikan pengisytiharan yang memihak kepada plaintif-plaintif tanpa mengambil kira kelewatan yang melampau dan kelakuan plaintif-plaintif dan PW1 yang boleh dipersoalkan. Penggunaan budi bicara PK yang bijaksana untuk memberikan pengisytiharan dalam kes ini tanpa mengambil kira kelewatan yang melampau dan kelakuan plaintif-plaintif dan PW1 yang boleh dipersoalkan adalah terjumlah kepada kekhilafan undang-undang ('kekhilafan undang-undang kelapan') (lihat perenggan 100).]

Cases referred to

Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196, FC (refd)
Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85, FC (refd)
Hassnar Hj MP Ebrahim v Musah Ghani & Ors [2021] 12 MLJ 322, HC (refd)
Hew Sook Ying v Hiw Tin Hee [1992] 2 MLJ 189; [1992] 1 CLJ Rep 120, SC (refd)
Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768, FC (distd)
Khazanah Jaya Sdn Bhd v Hisco (M) Sdn Bhd [2022] 5 MLJ 744, CA (refd)
Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (distd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Saikee bt Tungku v Leicester Jorence @ Joekhen Tungku [2019] MLJU 1836; [2019] MLRHU 1639, HC (distd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (refd)
See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank (M) Bhd and another appeal [2021] 5 MLJ 759, FC (distd)
Sembagavally a/p Murugason v Tee Seng Hock [2020] 7 MLJ 1; [2019] 5 MLRH 512, HC (distd)
T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd [2018] 5 MLJ 711, FC (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1, FC (distd)
Yeow Guang Cheng v Tang Lee Hiok & Ors [2020] MLJU 1936, HC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 17(a), (b), (c), (d), (e)
Contracts Act 1950 s 18(a), (b), (c)
Evidence Act 1950 s 114(g)
Limitation Act 1953 ss 6(1), (1)(a), 9, 9(1)
National Land Code ss 5, 89(a), 322, 326(2), 340(1), (2), (2)(a), (2)(b), (2)(c), (3), 418(1), Form 5BK
Powers of Attorney Act 1949
Rules of Court 2012 O 15 r 16, O 20 rr 5(1), 8(1)
Specific Relief Act 1950 ss 38(1), 40, 41, 42
Small Estates Distribution Act 1955
Stamp Act 1949

Appeal from: *Rahimah bt Mohd Noor dan lain-lain lwn Pacific Ocean Equity Sdn Bhd dan lain-lain* [2022] MLJU 1753 (High Court, Kuala Lumpur)

Ng Sai Yeang (with Teoh Chye Yi) (Raja, Darryl & Loh) for the appellants.

Jayanthi Devi a/p Balaguru (with K Sathiya Devi) (R Rajan & Co) for the respondent.

Wong Kian Kheong JCA:

A. INTRODUCTION

[1] This appeal concerns a piece of land held under Grant 35019, Lot 303, Section 87A, Bandar Kuala Lumpur, Daerah Kuala Lumpur with a postal address of No 3, Lorong Gurney, 54100 Kuala Lumpur ('the land').

B. BACKGROUND

[2] We shall refer to parties as they were in the High Court (HC).

[3] On 23 March 1973 the late Encik Nik Yusoff bin Wan Omar (deceased) acquired title to the land and built a two-storey bungalow on the land.

[4] The first plaintiff ('first plaintiff') is the deceased's wife while the second to fourth plaintiffs ('second plaintiff' to 'fourth plaintiff') are the children of the deceased. This judgment shall refer to the first to fourth plaintiffs collectively as the 'plaintiffs'.

[5] Upon the deceased's death, on 21 December 1993 the deceased's title of the land was transmitted to the plaintiffs as follows:

(1) the second to fourth plaintiffs were registered as co-proprietors of the land with each of the second to fourth plaintiffs holding 1/4 undivided share of the land; and

(2) the first plaintiff held 1/4 undivided share of the land on trust for the benefit of Puan Nik Rus Mazelin bt Yusoff ('PW4'). At the time of the above transmission of title of the land, PW4 was a minor.

[6] Encik Rauf bin Abdul Latiff ('PW1') is the fourth plaintiff's husband.

[7] The deceased and his family stayed on the land until 1979 when the deceased passed on. After the deceased's demise, the plaintiffs and PW4 moved out from the land and had never returned since then.

[8] In 2003, PW1 met the fourth defendant ('fourth defendant'), a director of Firewall Technologies (M) Sdn Bhd ('Firewall'). PW1 and the fourth defendant discussed the prospect of a joint venture in an offshore business ('joint venture proposal'). To finance the joint venture proposal, the fourth defendant informed PW1 as follows:

(1) Firewall had secured a US$15m credit facility from OCBC Bank of Singapore ('OCBC credit facility');

(2) the OCBC credit facility required Firewall to provide a 'bank debt instrument' up to 20% of the value of the OCBC credit facility (bank debt instrument) as a pre-condition for the release of the OCBC credit facility; and

(3) the fourth defendant had arranged for Royal Bank of Scotland to provide the bank debt instrument of a value of US$1m but the fourth defendant could not pay the cost of about US$40,000 to obtain the bank debt instrument ('cost (bank debt instrument)').

[9] The fourth defendant requested PW1 to provide the cost (bank debt instrument) and in consideration thereof, the fourth defendant would sign an agreement with PW1 regarding the joint venture proposal. PW1 agreed and provided the cost (bank debt instrument). Hence, the following two agreements were concluded:

(1) the fourth defendant and PW1 entered into a memorandum of agreement on 20 November 2003; and

(2) a joint venture agreement dated 20 November 2003 ('JVA') was executed by Firewall and Emerald Graphics Sdn Bhd ('Emerald Graphics'). PW1 signed the JVA as Emerald Graphics' Managing Director.

[10] Sometime in April 2004, the fourth defendant informed PW1 that OCBC Bank required Firewall to provide a 'safe keeping receipt' as an insurance to be taken against the bank debt instrument. The premium of the safe keeping receipt was US$60,000. According to the fourth defendant:

(1) the second and third defendants ('second defendant' and 'third defendant') were friends of the fourth defendant;

(2) the second and third defendants agreed to give to Firewall a friendly loan of US$60,000 ('friendly loan (second and third defendants)') with the condition that the second and third defendants were given security for the friendly loan (second and third defendants) in the form of physical possession of an original issue document of title ('IDT') of unencumbered land; and

(3) the fourth defendant had no land which was free from encumbrance. As such, the fourth defendant could not provide an IDT as security for the friendly loan (second and third defendants).

[11] PW1 agreed to the fourth defendant's above proposal and handed the original IDT of the land ('original IDT') to the fourth defendant as security for the friendly loan (second and third defendants).

[12] The fourth defendant informed PW1 that as the land had 'multiple owners', the second and third defendants requested for a power of attorney ('PA') from the plaintiffs which would authorise the second and third defendants to deal with the land in the event that the friendly loan (second and third defendants) could not be repaid by Firewall (request (second and third defendants)).

[13] PW1 conveyed the request (second and third defendants) to the plaintiffs and the plaintiffs acceded to the request (second and third defendants).

[14] When the fourth defendant brought a PA for the execution of the plaintiffs, PW1 discovered that the PA was in favour of the first defendant company ('first defendant') and not for the benefit of the second and third defendants. When queried by PW1, the fourth defendant stated that the second and third defendants were owners and directors of the first defendant. Based on this representation by the fourth defendant, the plaintiffs executed the PA dated 10 May 2004.

[15] With regard to the PA:

(1) the PA was prepared by Mr Chong Boon Leong ('DW4'). DW4 is an Advocate and Solicitor ('A&S') who practises in a firm which was then known as Messrs Lee & Chow ('Messrs LC');

(2) the PA was deposited in the Kuala Lumpur ('KL') HC and KL land office; and

(3) the first defendant sent a letter dated 27 May 2004 to Firewall which stated, among others, as follows:

(a) the first defendant had provided a three-month 'short term financial aid' of RM235,000 to Firewall ('first defendant's short term loan') with the land as a collateral; and

(b) the first defendant shall not sell the land unless all the following conditions are fulfilled:

(i) the land can only be sold at a market value which is agreed to by the plaintiffs; and

(ii) the land can only be sold after the expiry of three months, ie, after the expiry of the first defendant's short term loan.

[16] The sixth defendant ('sixth defendant') is the wife of the seventh defendant ('seventh defendant').

[17] In June 2004, the sixth defendant came upon a 'FOR SALE' banner at the front gate of the land ('sale banner (land)'). The sixth defendant then met Mr Walter Chin Kuan Swee ('DW5'), a real estate negotiator attached to 'LMC Realty' (LMCR).

[18] LMCR had been appointed by the first defendant to sell the land.

[19] When the sixth defendant inspected the land, the bungalow on the land was dilapidated.

[20] On 22 June 2004 the sixth and seventh defendants signed a document prepared by LMCR which stated an offer by the sixth and seventh defendants to purchase the land at a price of RM750,000. This offer was accepted by the first defendant.

[21] According to the first defendant's records with SSM:

(1) the second and third defendants resigned as the first defendant's directors with effect from 2 July 2004; and

(2) with effect from 1 July 2004 the fourth and fifth defendants ('fourth defendant' and 'fifth defendant') were appointed as directors of the first defendant.

[22] For the acquisition of title of the land, the sixth and seventh defendants had appointed an A&S, Ms Tan Lin Lin ('DW2'), from Messrs Tai, Azril & Tan ('Messrs TAT'), to act for the sixth and seventh defendants.

[23] On behalf of the sixth and seventh defendants, Messrs TAT:

(1) conducted a search on the land at the KL land office;

(2) conducted a search of the first defendant based on the records of the first defendant lodged with 'Suruhanjaya Syarikat Malaysia' ('SSM');

(3) contacted DW4 (at Messrs LC) who confirmed that DW4 had prepared the PA. DW4 also provided DW2 with a certified true copy of the PA and written proof of deposit of the PA in KL HC and KL land office; and

(4) prepared a sale and purchase agreement ('SPA') and memorandum of transfer ('MOT') for the acquisition of the land by the sixth and seventh defendants at a price of RM750,000.

[24] On behalf of the first defendant, DW5 handed to Messrs TAT, among others:

(1) the original IDT;

(2) the SPA to which was annexed a statutory declaration ('SD') affirmed by PW4 on 13 July 2004 (PW4's SD (13 July 2004)) before a commissioner for oaths ('CFO'). PW4's SD (13 July 2004) affirmed that, among others, PW4 had authorised the first defendant to sell the land;

(3) the MOT; and

(4) a letter dated 13 July 2004 from the first defendant to Messrs TAT with, among others:

(a) certified true copies of the first defendant's memorandum of association ('MA'), articles of association ('AA'), Forms 24 and 49; and

(b) the first defendant's resolution which authorised the second and third defendants to sign the SPA and MOT on behalf of the first defendant ('first defendant's resolution').

The SPA and MOT had been signed by the second and third defendants on behalf of the first defendant. The common seal of the first defendant had been affixed on the SPA and MOT.

[25] On 14 July 2004, the sixth and seventh defendants signed the SPA and MOT. Thereafter:

(1) the sixth and seventh defendants entered a private caveat over the land on 16 July 2004 ('private caveat (sixth and seventh defendants)');

(2) Messrs TAT released the first cheque for RM15,000 (payable to LMCR) together with a second cheque for RM60,000 in favour of the first defendant (both cheques comprised 10% of the purchase price of the land); and

(3) on 21 July 2004 Messrs TAT submitted the MOT for adjudication of stamp duty under the Stamp Act 1949. The Collector of Stamp Duties had assessed a sum of RM36,000 as stamp duty chargeable for the MOT ('stamp duty (MOT)'). The sixth and seventh defendants had paid the stamp duty (MOT).

[26] The first defendant sent a letter dated 22 September 2004 to Firewall and plaintiffs which offered to purchase the land at a price of RM1.5m ('first defendant's offer (land)'). The plaintiffs accepted the first defendant's offer (land) by signing at the bottom of the first defendant's offer (land).

[27] Messrs TAT presented to the land office on 7 October 2004 the MOT together with, among others, the original IDT, PA and PW4's SD (13 July 2004).

[28] The MOT could not be registered by the land office because the plaintiffs did not pay quit rent for the land for four years since 2000 ('outstanding quit rent'). The outstanding quit rent totaled RM26,701. On 20 October 2004, the first defendant agreed for the sixth and seventh defendants to utilise part of the balance purchase price (due to the first defendant) to pay the outstanding quit rent and penalty imposed by the land office for late registration of the MOT ('penalty (land office)'). Consequently, the sixth and seventh defendants paid the outstanding quit rent and penalty (land office).

[29] On 7 October 2004, the plaintiffs alleged that the plaintiffs had entered into a memorandum of agreement with the first defendant for the sale of the land by the plaintiffs to the first defendant ('MOA (plaintiffs-first defendant)'). The plaintiffs did not however adduce the MOA (plaintiffs-first defendant) as evidence in this case. In sub-para 79(4) below, we will discuss the effect of the plaintiffs' failure to tender the MOA (plaintiffs-first defendant) as evidence at the trial of this case ('trial').

[30] On 27 October 2004:

(1) Messrs TAT re-presented the MOT to the land office for registration; and

(2) the sixth and seventh defendants were registered as co-proprietors of the land ('MOT's registration (27 October 2004)').

[31] On 8 November 2004, the land office sought confirmation from the first plaintiff (trustee for her youngest daughter, PW4) regarding the first plaintiff's execution of the PA as a trustee for PW4's 1/4 undivided share of the land. The first plaintiff affirmed a SD on 9 November 2004 before a CFO which stated that the first plaintiff had executed the PA as PW4's trustee for the land ('first plaintiff's SD (9 November 2004)'). The first plaintiff's SD (9 November 2004) did not however state that the first plaintiff was a trustee for PW4's 1/4 undivided share of the land. This fact was subsequently confirmed in the first plaintiff's SD affirmed before a CFO on 25 November 2004 ('first plaintiff's SD (25 November 2004)').

[32] The sixth and seventh defendants had paid a sum of RM5,388 as arrears of assessment rate imposed on the land by Dewan Bandaraya Kuala Lumpur ('outstanding assessment rate').

[33] Messrs TAT received from the land office, the original IDT for the land which had been issued from KL land office's computerised land registration system ('IDT (Form 5BK)').

[34] On 29 December 2004:

(1) Messrs TAT handed over the IDT (Form 5BK) to the sixth and seventh defendants; and

(2) the balance purchase price for the land (less, among others, outstanding quit rent, outstanding assessment rate and penalty (land office)) was paid by the sixth and seventh defendants to the first defendant.

[35] The first defendant sent a letter dated 12 January 2005 to Firewall and plaintiffs which stated that, among others, the sale of the land had been completed as scheduled and the 'full balance payment' of the price of the land ('balance purchase price (plaintiffs)') would be released to the plaintiffs by 12 April 2005 ('first defendant's letter (12 January 2005)').

[36] In April 2005 the first defendant handed to PW1 a Malayan Banking Bhd's cheque dated 12 July 2005 in favour of the fourth plaintiff for a sum of RM1,260,328.80 ('first defendant's post-dated cheque (12 July 2005)'). The first defendant's post-dated cheque (12 July 2005) was for the payment of the balance purchase price (plaintiffs).

[37] On several occasions, the fourth defendant had asked PW1 not to bank in the first defendant's post-dated cheque (12 July 2005) because:

(1) the first defendant had no money to honour the first defendant's post-dated cheque (12 July 2005); and

(2) the first defendant had arranged for a bank loan to pay for the balance purchase price (plaintiffs) ('first defendant's bank loan application'). If the first defendant's post-dated cheque (12 July 2005) was presented by the plaintiffs for payment by the bank and if the first defendant's post-dated cheque (12 July 2005) 'bounced', this would adversely affect the chances of the first defendant's bank loan application.

[38] The then six-month validity period for the first defendant's post-dated cheque (12 July 2005) expired and PW4 could not thereafter contact the fourth defendant. PW4 conducted a land search and discovered that the land had been transferred to the sixth and seventh defendants.

[39] The sixth and seventh defendants demolished the existing two-storey bungalow on the land and built a new bungalow with swimming pool

('property') at a cost of more than RM2m. On 8 August 2006, the sixth and seventh defendants moved into the property and have resided at the property ever since.

[40] On 19 December 2007, the plaintiff's then solicitors, Messrs S Kandasami & Co ('Messrs KC') sent the following two demands (two demands (Messrs KC)):

(1) the first demand was made on the first, second and third defendants to pay the balance purchase price (plaintiffs); and

(2) the second demand was sent to the fourth and fifth defendants to pay the balance purchase price (plaintiffs).

The plaintiffs did not make any demand on the sixth and seventh defendants. The two demands (Messrs KC) were only copied to the sixth and seventh defendants. It was expressly stated in the two demands (Messrs KC), among others:

(a) the land had been transferred to the sixth and seventh defendants; and

(b) the first to fifth defendants had 'fraudulently procured' the transfer of the land to the sixth and seventh defendants.

[41] The fourth plaintiff entered a private caveat over the land on 4 January 2008 ('fourth plaintiff's private caveat (4 January 2008)'). With regard to the fourth plaintiff's private caveat (4 January 2008):

(1) on 28 October 2008, the then solicitors for sixth and seventh defendants, Messrs KH Tai & Co, applied to the Registrar of Titles ('ROT') to remove the fourth plaintiff's private caveat (4 January 2008); and

(2) the ROT removed the fourth plaintiff's private caveat (4 January 2008) on 2 April 2009 ('ROT's removal of fourth plaintiff's private caveat (2 April 2009)').

C. PROCEEDINGS IN HC

C(1) Suit filed by plaintiffs against first to seventh defendants (original action)

[42] On 16 April 2013, the plaintiffs filed the original action against the first to seventh defendants (referred collectively in this judgment as the 'defendants'). The plaintiffs' statement of claim ('SOC') had prayed for the following relief, among others, against the defendants:

(1) a declaration that the PA is null and void ('Prayer 1 (SOC)');

(2) an order that the deposit of the PA in KL HC is null and void ('Prayer 2 (SOC)'); A

(3) an order that the deposit of the PA in KL land office is null and void ('Prayer 3 (SOC)');

(4) a declaration that any sale and purchase agreement made in relation to the land between the first to fifth defendants on the one part and the sixth and seventh defendants on the other part is null and void ('Prayer 4 (SOC)'); B

(5) a declaration that the registration of the MOT is null and void ('Prayer 5 (SOC)'); C

(6) an order that the Director of Wilayah Persekutuan's Land Office and Mines shall cancel the memorial in:

(a) the Register Document of title ('RDT') kept at the KL land office; and D

(b) the duplicate IDT of the land ('duplicate IDT'),

regarding the transfer of the land to the sixth and seventh defendants ('Prayer 6 (SOC)');

(7) an order that the sixth and seventh defendants shall return the original IDT to the plaintiffs or the plaintiffs' solicitors within seven days from the date of the court's order ('Prayer 7 (SOC)'); E

(8) aggravated damages and exemplary damages shall be paid by the defendants for the fraud committed by the defendants ('Prayer 8 (SOC)'); and F

(9) as an alternative to all the above prayers, an order for the defendants to pay damages to the plaintiffs based on the present market value of the land ('Prayer 9 (SOC)'). G

C(2) Judgment in default of defence

[43] The plaintiffs applied to John Louis O'Hara J and obtained a judgment in default of defence on 1 July 2013 against the defendants ('default judgment'). Prayer 1 (SOC) to Prayer 7 (SOC) were granted in the default judgment. H

[44] Pursuant to the default judgment, by way of Presentation No PDB13776/2017 on 13 November 2017, the land office registered the plaintiffs as co-proprietors of the land (plaintiffs' title (default judgment)). I

[45] The default judgment was not served on the sixth and seventh defendants. Nor did the plaintiffs apply to court for a writ of possession to

compel the sixth and seventh defendants to deliver possession of the land to the plaintiffs. In Part O below, this court will discuss the significance of such a conduct by the plaintiffs.

[46] Towards December 2017, a neighbour of the sixth and seventh defendants conducted a search of the land and informed the sixth and seventh defendants that the land had been transferred out of the names of the sixth and seventh defendants. Thereafter, the sixth and seventh defendants conducted their own land search and discovered the following matters, among others:

(1) the default judgment; and

(2) the plaintiffs were registered in the RDT as co-proprietors of the land.

[47] The sixth and seventh defendants had not been informed by the plaintiffs of the original action, default judgment and plaintiffs' title (default judgment). Part O below shall discuss this conduct of the plaintiffs.

[48] On 22 December 2017 the sixth defendant lodged a police report, Balai Polis Sentul No THSL/037656/17 regarding the plaintiffs' title (default judgment).

[49] On application by the sixth and seventh defendants, Faizah Jamaludin JC (as she then was) in the HC gave the following orders, among others, on 25 May 2018 ('HC's order (25 May 2018)'):

(1) the default judgment against the sixth and seventh defendants was set aside;

(2) leave and extension of time were granted to the sixth and seventh defendants to:

(a) enter appearance with regard to the original action; and

(b) file defence against the original action and counterclaim, if any.

(3) the plaintiffs shall deliver to the learned HC's Deputy Registrar ('DR') the duplicate IDT or replacement IDT of the land ('replacement IDT') which will be kept by the DR until final disposal of this case;

(4) all and any registration, endorsement or entry regarding any dealing in respect of the land shall be stayed until final disposal of this case ('para 6 (HC's order, 25 May 2018)'); and

(5) the plaintiffs shall pay costs of RM5,000 to the sixth and seventh defendants (subject to allocatur fee).

[50] The plaintiffs did not appeal to the Court of Appeal against HC's order (25 May 2018).

[51] The solicitors for the sixth and seventh defendants had presented the HC's order (25 May 2018) to the land office and obtained the reinstatement of the registration of the sixth and seventh defendants as co-proprietors of the land ('title reinstatement (sixth and seventh defendants)').

[52] The first to fifth defendants did not apply to set aside the default judgment. Henceforth, this judgment shall refer to the default judgment against the first to fifth defendants as the 'default judgment (first to fifth defendants)'.

C(3) Counterclaim by sixth and seventh defendants (counterclaim)

[53] In the counterclaim, the sixth and seventh defendants prayed for the following remedies, among others:

(1) a declaration that the registration of the plaintiffs' title (default judgment) is void;

(2) an order that the transfer of the land from the sixth and seventh defendants to the plaintiffs (which registered the plaintiffs' title (default judgment)) shall be set aside;

(3) an order that the plaintiffs shall deliver and/or surrender within seven days from the date of the court's order:

   (a) the duplicate IDT regarding the plaintiffs' title (default judgment) ('plaintiffs' duplicate IDT (default judgment)'); and/or

   (b) replacement IDT regarding the plaintiffs' title (default judgment) ('plaintiffs' replacement IDT (default judgment)')

   to the DR who will surrender the plaintiffs' duplicate IDT (default judgment) and/or plaintiffs' replacement IDT (default judgment) to the ROT to be destroyed forthwith;

(4) an order that the ROT shall within 14 days from the date of the court's order expunge from the RDT the registration of the plaintiffs' title (default judgment);

(5) an order that the ROT and land office shall within 14 days from the date of the court's order reinstate on the RDT the names of the sixth and seventh defendants as registered co-owners of the land; and

(6) an order that the plaintiffs shall pay to the sixth and seventh defendants damages for all loss suffered by the sixth and seventh defendants as a

result of the registration of the plaintiffs' title (default judgment) and the amount of damages shall be assessed by the court.

C(4) Trial

[54] The summary for the plaintiffs' case ('summary (plaintiffs' case)') which had been filed pursuant to HC's pre-trial case management ('PTCM') directions only relied on the following allegations against the defendants:

(1) the defendants had defrauded the plaintiffs regarding the land;

(2) documents had been forged by the defendants regarding the transfer of title of the land to the sixth and seventh defendants ('title (sixth and seventh defendants)'); and

(3) the defendants had conspired to defraud and/or forge documents which had caused the registration of the title (sixth and seventh defendants).

[55] In accordance with HC's PTCM directions, the plaintiffs' solicitors filed the following two issues to be tried in this case (HC encl No 69):

(1) whether fraud had been committed in an attempt (*percubaan*) to register the transfer of title to the land from the plaintiffs to the sixth and seventh defendants; and

(2) whether the sixth and seventh defendants had any interest in the land, ('plaintiffs' two issues to be tried').

[56] The following six witnesses testified in support of the original action and to resist the counterclaim:

(1) PW1;

(2) the second, third and fourth plaintiffs;

(3) PW4; and

(4) Puan Nur Azura bt Abdul Rahman ('PW5'), an officer from KL land office.

[57] Eight witnesses gave evidence to oppose the original action and to support the counterclaim:

(1) Ms Florence Lee Poh Choo ('DW1'), a potential purchaser of the land;

(2) DW2;

(3) Puan Siti Hasmidar bt Hassan, SSM's officer;

(4) DW4;

(5) DW5;

(6) Mr Peter Ho Seng Chan, an architect appointed by the sixth and seventh defendants to build a new bungalow on the land; and

(7) the sixth and seventh defendants.

C(5) HC's decision and reasons

[58] After the trial, Latifah bt Mohd Tahar JC (as she then was) ('JC') decided as follows ('HC's decision'):

(1) Prayer 1 (SOC) to Prayer 7 (SOC) were granted;

(2) the counterclaim was dismissed;

(3) costs of RM80,000 shall be paid by the sixth and seventh defendants to the plaintiffs; and

(4) the plaintiffs shall pay damages to the sixth and seventh defendants which shall be assessed by the HC ('HC's decision (damages payable by plaintiffs to sixth and seventh defendants)').

[59] According to the grounds of judgment of the learned JC ('GOJ'), in brief:

(1) in paras 58 to 73 GOJ:

(a) the learned JC relied on the default judgment (first to fifth defendants) to decide that the PA was invalid against the sixth and seventh defendants. Hence, the counterclaim was dismissed on this ground alone;

(b) the learned JC followed the HC's decision delivered by Mairin Idang J in *Saikee bt Tungku v Leicester Jorence @ Joekhen Tungku* [2019] MLJU 1836; [2019] MLRHU 1639; and

(c) premised on s 40 of the Specific Relief Act 1950 ('the SRA'), the HC's decision (damages payable by plaintiffs to sixth and seventh defendants) was made;

(2) the learned JC found as a fact that the first to fifth defendants committed fraud on the plaintiffs which led to the transfer of title to the land from the plaintiffs to the sixth and seventh defendants ('fraud (first to fifth defendants)') — please refer to paras 76 to 204 and 229 to 231 GOJ. In paras 100 and 101 GOJ, the learned JC relied on the judgment of Jeffrey Tan Kok Wha FCJ in the Federal Court case of *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 to decide that the sixth and

seventh defendants could not rely on the PA due to the fraud (first to fifth defendants);

(3) the SPA and MOT were invalid because:

(a) according to the evidence of PW5, based on the National Land Code ('the NLC') and Companies Act 1965 ('the CA (1965)'), a MOT can only be lawfully executed on behalf of a company by two directors of the company (please see para 125 GOJ). When the second and third defendants signed the SPA and MOT on 14 July 2004, the second and third defendants were not the first defendant's directors. As such, according to paras 126, 128, 130 to 137, 141 and 143 GOJ, the SPA and MOT were not valid; and

(b) DW2 should have done due diligence to ensure that the SPA and MOT were valid — please see paras 127 and 142 GOJ;

(4) due to the fraud (first to fifth defendants), in paras 169 to 204 GOJ, the learned JC held that notwithstanding the fact that the sixth and seventh defendants were bona fide purchasers of the land for valuable consideration, the title (sixth and seventh defendants) was defeasible under s 340(2)(a) of the NLC. Reliance has been placed by the learned JC on, among others, the following cases:

(a) the judgment of Evrol Mariette Peters JC (as she then was) in the High Court in *Sembagavally a/p Murugason v Tee Seng Hock* [2020] 7 MLJ 1; [2019] 5 MLRH 512;

(b) the decision of Arifin Zakaria CJ (Malaya) (as he then was) in the Federal Court case of *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1;

(c) the Federal Court's judgment delivered by Vernon Ong Lam Kiat FCJ in *See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank (M) Bhd and another appeal* [2021] 5 MLJ 759; and

(d) Jeffrey Tan Kok Wha FCJ's decision in the Federal Court in *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; and

(e) *Letchumanan Chettiar Alagappan*.

(5) in paras 208 to 227 GOJ, the learned JC had decided as follows:

(a) the sixth and seventh defendants had breached para 6 (HC's order, 25 May 2018) when the sixth and seventh defendants obtained the title reinstatement (sixth and seventh defendants) ('breach (HC's order, 25 May 2018)'); and

(b) the breach (HC's order, 25 May 2018):

(i) proved mala fides on the part of the sixth and seventh defendants as well as their solicitors;

(ii) amounted to a contempt of court because the sixth and seventh defendants had interfered with the administration of justice in this case; and

(iii) indirectly undermined (*secara tidak langsung menggugat*) the counterclaim; and

(g) the SPA was signed in 2004 while the MOT was registered in 2005. The original action was not time-barred because the original action was filed in 2013 and was within the limitation period of 12 years — please refer to para 228 GOJ.

[60] The sixth and seventh defendants have appealed against the entire HC's decision ('this appeal').

D. SUMMARY OF CONTENTIONS BY SIXTH AND SEVENTH DEFENDANTS

[61] In brief, learned counsel for the sixth and seventh defendants had advanced the following submission in support of this appeal:

(1) the default judgment (first to fifth defendants) cannot bind the sixth and seventh defendants;

(2) the sixth and seventh defendants were neither parties nor privy to the fraud (first to fifth defendants). As such, the title (sixth and seventh defendants) was not defeasible under s 340(2)(a) of the NLC;

(3) the SOC did not plead that the MOT was an 'insufficient or void instrument' pursuant to s 340(2)(b) of the NLC. The plaintiffs only relied on s 340(2)(b) of the NLC in para 3 of their 'Reply to Defence and Defence to Counterclaim' ('RDDCC'). The RDDCC was only filed on 16 July 2018 (more than 13 years after the registration of the MOT (27 October 2004)). Consequently, the plaintiffs are time-barred from relying on s 340(2)(b) of the NLC to render defeasible the title (sixth and seventh defendants);

(4) the PA was duly executed and deposited in accordance with the Powers of Attorney Act 1949 ('the PAA');

(5) the sixth and seventh defendants were third parties who had dealt with the first defendant in good faith. By virtue of the rule in *Turquand*'s case, the sixth and seventh defendants were not required to inquire into the first defendant's internal matters;

(6) the first defendant did not challenge the authority of the second and third defendants to execute the SPA and MOT on behalf of the first defendant;

(7) the sixth and seventh defendants did not breach the HC's order (25 May 2018) by obtaining the title reinstatement (sixth and seventh defendants);

(8) the original action under the MOA (plaintiffs-first defendant) was time-barred by January 2012; and

(9) the learned JC made the following plain errors of fact:

(a) the learned JC stated that Firewall was a RM2 paid up company when there was no such evidence to support such a factual finding; and

(b) the learned JC held that the plaintiffs did not receive any money from the first defendant with regard to the land but the plaintiffs admitted that they had in fact received RM270,000.

E. OUTLINE OF PLAINTIFFS' SUBMISSION

[62] In opposing this appeal, in gist, the plaintiffs' learned counsel had contended as follows:

(1) as the default judgment (first to fifth defendants) had declared the PA to be invalid, the sixth and seventh defendants could not rely on the PA to support this appeal;

(2) the SPA and MOT were void under s 340(2)(b) of the NLC because when the second and third defendants signed the SPA and MOT on behalf of the first defendant, the second and third defendants were no longer the first defendant's directors;

(3) fraud (first to fifth defendants) had been committed on the plaintiffs;

(4) the sixth and seventh defendants had actual and/or constructive knowledge of the fraud (first to fifth defendants); and

(5) the sixth and seventh defendants had profited from the fraud (first to fifth defendants).

F. ISSUES

[63] This appeal raises the following questions:

(1) whether the learned JC could rely on the default judgment (first to fifth defendants) to decide that the PA was invalid;

(2) did the sixth and seventh defendants breach the HC's order (25 May 2018) by obtaining the title reinstatement (sixth and seventh defendants)? Even if the breach (HC's order, 25 May 2018) had been committed by the sixth and seventh defendants, can the breach (HC's order, 25 May 2018) be a ground for the learned JC to:

(a) allow the original action; and

(b) dismiss the counterclaim.

(3) were the sixth and seventh defendants parties or privy to the fraud (first to fifth defendants) within the meaning of s 340(2)(a) of the NLC?

(4) whether the plaintiffs could allege that:

(a) the SPA was invalid; and

(b) MOT was an 'insufficient' and/or 'void' instrument' under s 340(2)(b) of the NLC (causes of action (invalid SPA/insufficient and void MOT)) when:

(i) the plaintiffs did not plead in the SOC regarding the causes of action (invalid SPA/insufficient and void MOT);

(ii) the causes of action (invalid SPA/insufficient and void MOT) were not stated in the summary (plaintiffs' case); and

(iii) the issues regarding the causes of action (invalid SPA/insufficient and void MOT) were not raised in the plaintiffs' two issues to be tried;

(5) even if the plaintiffs could aver in this case regarding the causes of action (invalid SPA/insufficient and void MOT):

(a) whether the first defendant can dispute the fact that the second and third defendants had no actual authority to execute the SPA and MOT on the first defendant's behalf when:

(i) the first defendant's resolution had authorised the second and third defendants to sign the SPA and MOT on behalf of the first defendant; and

(ii) the first defendant's common seal had been affixed on the SPA and MOT.

(b) can the sixth and seventh defendants rely on the Indoor Management Rule or the rule in *Turquand*'s case to assume that the second and third defendants had been authorised by the first defendant to sign the SPA and MOT on the first defendant's behalf?

(c) were the sixth and seventh defendants required by law to inquire on whether the second and third defendants had actual authority from the first defendant to sign the SPA and MOT on behalf of the first defendant?

(d) did the learned JC commit an error in law by relying on the opinion evidence of PW5 regarding the effect of NLC and CA (1965)? and

(e) whether PA, SPA and MOT were invalid solely on the ground that the second and third defendants were not the first defendant's directors when they signed the SPA and MOT on behalf of the first defendant;

(6) are the plaintiffs time-barred from instituting the original action to recover the land? This issue depends whether the court should apply the six-year limitation period for suits based on the tort of fraud under s 6(1)(a) of the Limitation Act 1953 ('the LA') or the 12-year limitation period to recover land as provided in s 9(1) of the LA;

(7) whether the HC's decision (damages payable by plaintiffs to sixth and seventh defendants) was lawfully made pursuant to ss 38(1) and 40 of the SRA; and

(8) whether the HC had correctly exercised its discretion under s 41 of the SRA and O 15 r 16 of the Rules of Court 2012 ('the RC') to grant declarations in favour of the plaintiffs as per Prayer 1 (SOC) to Prayer 5 (SOC) when the plaintiffs and PW1 were guilty of, among others, inordinate delay and questionable conduct.

OUR DECISION

G. CAN HC RELY ON DEFAULT JUDGMENT (FIRST TO FIFTH DEFENDANTS) TO DECLARE PA TO BE INVALID?

[64] We are of the considered view that the learned JC had erred in law when Her Ladyship relied on the default judgment (first to fifth defendants) to decide that the PA was invalid as against the sixth and seventh defendants ('first legal error'). Our reasons are as follows:

(1) by virtue of s 42 of the SRA, the default judgment (first to fifth defendants):

(a) only binds the first to fifth defendants; and

(b) has no effect on the sixth and seventh defendants.

Section 42 of the SRA is reproduced below:

> *A declaration made under this Chapter is binding only on the parties to the suit*, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, those parties would be trustees. (Emphasis added.)

(2) the learned JC's reliance on the default judgment (first to fifth defendants) against the sixth and seventh defendants is contrary to the HC's order (25 May 2018) (which has set aside the default judgment against the sixth and seventh defendants); and

(3) the following trilogy of cases support the above decision:

(a) in the Federal Court case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 987:

(i) the appellants' deceased father was the registered co-proprietor of 2/3 undivided share in two lots of land;

(ii) the first respondent wrongfully obtained an order under the Small Estates Distribution Act 1955 to distribute the deceased's 1/3 undivided share to the first to fourth respondents only;

(iii) the first to fourth respondents subsequently sold and transferred each of their total one-third undivided share in the two lots to the fifth and sixth respondents respectively;

(iv) the appellants applied to court to, among others, invalidate the distribution order and set aside the registration of the one-third share in the two lots in the names of the fifth and sixth respondents;

(v) the appellants obtained judgment in default against the first to fourth respondents and the High Court ordered the immediate cancellation of the distribution order; and

(vi) on the question of the effect of the default judgment on the appellants' claim and defence of the fifth and sixth respondents, Jeffrey Tan Kok Wha FCJ decided as follows, at [11]:

> [11] *Given that alleged fraud passed wholly unanswered by the first to fourth respondents, the trial court at 43 AR (Appeal Record) was wholly warranted to hold that with default judgment against the first to fourth respondents, fraud by them needed not to be proved by the appellants*. But later, the trial court expressed an inconsistent opinion. At 52 AR, the trial court held, so as to distinguish *Tan Ying Hong*, that the default judgment was not a specific finding that the first to fourth respondents committed fraud in the distribution of the estate of the deceased to themselves. *With respect, the judgment was the judicial decree that fraud by the first to fourth respondents had been made out. The cause of action of the appellants against the first to fourth respondents was fraud in the distribution of the estate of the deceased. When judgment was entered against the first to fourth respondents, all allegations of fraud which gave rise to the cause of action merged in the judgment (see Distillers Co Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd (1974) 2 ALR 321, where the High Court of Australia per Menzies J said '… the plaintiff's cause of action against the insured would merge in the judgment once it was*

> *obtained …') and the rights of the appellants to relief became rights to enforce the judgment (see Liaw Watt Lee & Ors v Baiduri Bank Bhd and another appeal [2010] 5 MLJ 551, where the Brunei Court of Appeal per Power PCA expressed 'that generally when judgment is given in an action, the original causes of action merge in the judgment; the plaintiff's rights to relief as expressed in the statement of claim are extinguished and become rights to enforce the judgment instead'). Until set aside, the default judgment was the incontestable proof of fraud by the first to fourth respondents.* (Emphasis added.)

It is clear from the aforesaid passage that the default judgment against the first to fourth respondents only bound the first to fourth respondents;

(b) in *See Leong Chye*, at (64(ii)), Vernon Ong Lam Kiat FCJ held in the Federal Court that 'When an allegation of fraud against a party is unanswered under a default judgment, the allegation of fraud is taken to have been made out and need not to be proved'. In this case, the sixth and seventh defendants had adduced evidence at the trial to prove that they were neither parties nor privy to the fraud (first to fifth defendants) — please refer to paras 76 and 77 below; and

(c) in *Hassnar Hj MP Ebrahim v Musah Ghani & Ors* [2021] 12 MLJ 322, the plaintiff had obtained a judgment in default of defence against certain co-defendants in that case. Celestine Stuel Galid J decided in the HC that the plaintiff could not rely on the default judgment against the other co-defendants who had resisted the suit. According to Celestine J, at [22] and [26]:

> [22] *Learned counsel for the plaintiff had submitted that this court's hands were therefore tied (with regard to the default judgment). I did not find this submission to be persuasive. For one, it must be remembered that default judgments can only estop what has been necessarily and with complete precision been decided — see the case of Mvaami (Pty) Ltd v Standard Finance Ltd [1977] (1) SA 861 (R) citing the case of New Brunswick Railway Cpn v British & French Trust Corporation Ltd [1938] (4) All ER 765* wherein it was held that:
>
> > *default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and they can estop only for what must necessarily and with complete precision have been thereby determined.*
>
> …
>
> [26] *The court was therefore not precluded from considering the full merits of the plaintiff's claim including on prayers 39.1(a), (c) and (i) and 39.2(i), (ii), (iii), (iv), (v), (vi) and (vii) notwithstanding the judgments in default.* (Emphasis added.)

H. DID SIXTH AND SEVENTH DEFENDANTS BREACH HC'S ORDER (25 MAY 2018)?

[65] With respect to the learned JC, we are unable to comprehend how the sixth and seventh defendants had breached the HC's order (25 May 2018), in particular its para 6, by obtaining the title reinstatement (sixth and seventh defendants). Furthermore, the plaintiffs did not apply to the learned JC to cite the sixth and seventh defendants for contempt of court in respect of the alleged breach of para 6 of the HC's order (25 May 2018). In any event, even if the breach (HC's order, 25 May 2018) had been committed by the sixth and seventh defendants, by any measure the breach (HC's order, 25 May 2018) could not be a lawful ground for the learned JC to allow the original action and to dismiss the counterclaim ('second legal error'). This is because except for setting aside the default judgment against the sixth and seventh defendants, the HC's order (25 May 2018) has no bearing on the outcome of the original action and counterclaim in this case.

[66] In fairness to the sixth and seventh defendants as well as their solicitors, we do not find any justification for the strictures made against them in the HC.

I. INDEFEASIBILITY OF REGISTERED TITLE AND INTEREST IN LAND

[67] We reproduce below ss 89(a) and 340(1) to (3) of the NLC:

> Section 89 Conclusiveness of register documents of title
>
> *Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence —*
>
> (a) *that title to the land described therein is vested in the person or body for the time being named therein as proprietor …*
>
> Section 340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) *The title or interest of any such person or body shall not be indefeasible —*
>
> (a) *in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy*; *or*
>
> (b) *where registration was obtained by forgery, or by means of an insufficient or void instrument; or*
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) *Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —*

(a) *it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and*

(b) *any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:*

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser. (Emphasis added.)

[68] Our understanding of the Torrens system of registration of titles and interest in land ('Torrens system'), the basis of our NLC, is as follows:

(1) s 89(a) NLC provides for the conclusiveness of the RDT (defined in s 5 of the NLC) ('conclusiveness of RDT principle'). According to the conclusiveness of RDT principle, as a general rule, all details of registration in the RDT of a title and interest in land ('title/interest') in the name of a person (X), is conclusive evidence of X's registered title/interest (subject to certain exceptions as provided in s 340(2)(a) to (c) of the NLC — please refer to sub-para (2) below);

(2) X's registered title/interest is indefeasible under s 340(1) of the NLC ('indefeasibility of registered title/interest principle'). X's registered title/interest is defeasible in the following circumstances as stipulated in s 340(2)(a) to (c) of the NLC ('exceptions (s 340(2)(a) of the NLC'):

(a) by reason of s 340(2)(a) of the NLC, X's registered title/interest has been obtained by 'fraud or misrepresentation' to which X is a 'party or privy' ('exception (s 340(2)(a) of the NLC');

(b) the registration of X's title/interest has been obtained by forgery within the meaning of s 340(2)(b) of the NLC ('forgery exception (s 340(2)(b) of the NLC');

(c) the registration of X's title/interest has been obtained by means of an 'insufficient or void instrument' as understood in s 340(2)(b) of the NLC ('insufficient/void instrument exception (s 340(2)(b) of the NLC'); and

(d) as provided in s 340(2)(c) of the NLC, where X's registered title/interest has been unlawfully acquired by X in the purported exercise of any power or authority conferred by any written law.

(3) NLC has provided for a claimant to title/interest ('claimant') to enter a private caveat under s 322 of the NLC in the RDT regarding the claimant's claim to the title/interest ('private caveat procedure'); and

(4) in view of the conclusiveness of RDT principle, indefeasibility of registered title/interest principle and private caveat procedure, parties only need to do a search of the RDT (land search) and rely on the contents of the land search. Consequently:

(a) the RDT is the 'mirror' of all registered titles/interests as well as all claims by claimants (who have entered private caveats in respect of their claims to the registered titles/interests). This is the 'mirror principle'; and

(b) all parties need not go behind the 'curtain' of the RDT ('curtain principle').

[69] With regard to the application of s 340(2)(a) to (c) of the NLC, we refer to the following judgment of Vernon Ong Lam Kiat FCJ in the Federal Court in *See Leong Chye*, at [64], [67] and [68]:

> [64] *The seven subsequent decisions of this court after Tan Ying Hong underscore the problems faced by trial courts when adjudicating on the issue of indefeasibility of a title or interest in land, and the related issue of whether a party is an immediate or subsequent purchaser. In our view, the aforesaid cases are illustrative of this court's adherence to the settled law on deferred indefeasibility and its application to the particular facts of each case. The ratio decidendi which emanates therefrom may be distilled as follows:*
>
> > *(i) Section 340 of the NLC confers deferred indefeasibility on title or interest in land. The indefeasibility of the interest of an immediate purchaser who acquires an interest under a charge by means of a forged instrument is deferred and liable to be set aside pursuant to sub-s 340(2) of the NLC: Tan Ying Hong.*
>
> > (ii) *When an allegation of fraud against a party is unanswered under a default judgment, the allegation of fraud is taken to have been made out and need not to be proved. fraudsters masquerading as the rightful landowners are not immediate purchasers and have no title to pass. Purchasers who acquired title to the land from these fraudsters are immediate purchasers, whose title are not indefeasible. As immediate purchasers, their title was not protected by the proviso to* sub-s 340(3) of the NLC*: Kamarulzaman Omar*.
>
> > (iii) A purchaser of land who has paid the full purchase price becomes the beneficial owner of the land; and the vendor who has received the full purchase price becomes the bare trustee for the purchaser. As a bare trustee, the vendor has no capacity in law to sell or transfer the land to any third party. A third party who acquires the land from such a vendor ranks as an immediate purchaser whose title is defeasible under sub-s 340(2) of the NLC. *The third party's title can be defeated by a prior non-registered interest of an equitable mortgagee under a deed of assignment in respect of the same piece of land: Samuel Naik*.
>
> > (iv) A chargee falls within the meaning of the word 'purchaser' under the proviso to sub-s 340(3) of the NLC. *A bank deriving its interest as a chargee of the land from a fraudster who became the registered owner of the land is a subsequent purchaser: CIMB Bank Bhd*.
>
> > (v) *The law recognises and enforces an overriding rule that in making and carrying*

out conveyancing transactions that commonly deals with a number of transactions and dealings to transfer real property, parties should act in good faith. Good faith does not simply mean absence of fraud, deceit or dishonesty; it also requires acting honestly, reasonably or fairly. An element of carelessness or negligence on the part of a purchaser negates good faith. Knowledge of a dispute as to the ownership of property and knowledge of fraud allegation could vitiate good faith. Good faith is also negated if a purchaser is not complicit in the fraud but has knowledge of the fraud affecting the title to the land. Ultimately, the elements of good faith are not closed and it depends on the circumstances of each case: T Sivam Tharamalingam.

(vi) The question of whether a party was a bona fide purchaser for value is a question of fact. The relevant time for determining the good faith of a subsequent purchaser is the circumstances prior and at the time of the registration of the transfer by the land officer: *Liputan Simfoni*

(vii) A solicitor who acted for a fraudster owner of land who sold the land, does not owe a duty of care to the real owner of the land where there is no element of foreseeability and/or proximity; and there being policy considerations against imposing such a duty. A replacement title in continuation generated by the land registry, when the original issue document of title was at all material times in the possession of the original owner, is valid and capable of validly passing title to the subject land to a subsequent bona fide purchaser for value within the meaning of the proviso to sub-s 340(3) of the NLC: *Puspaleela R Selvarajah*.

(viii) A vendor who has been paid the full purchase price for the land (for which issue document of title has not yet been issued) holds the land as a bare trustee for the purchaser. As such, notwithstanding that the issue document of title is subsequently issued in the vendor's name, the vendor is incapable of any further dealing with the land. A bank who takes a charge on the land from the vendor is an immediate purchaser whose interest is defeasible under sub-s 340(2) of the NLC. *The charge is liable to be set aside because the proviso to sub-s 340(3) of the NLC is not applicable to the charge of an immediate purchaser. The fact that the bank is a bona fide purchaser for value is immaterial: He-Con Sdn Bhd*

...

Whether a title or interest is defeasible or indefeasible?

[67] *The question of whether a title or interest in land is defeasible or indefeasible is a question of mixed fact and law. In our view, the answer to this question depends on whether the purchaser is an immediate or subsequent purchaser. This is a question of fact which turns on the particular circumstances of each case. If the purchaser is an immediate purchaser, then the law applicable to that purchaser's title or interest is sub-s 340(2) of the NLC. Accordingly, the immediate purchaser's title or interest is not indefeasible. His title or interest in the land may be set aside by the rightful owner of the land if it was obtained through any one of the vitiating factors listed under sub-s 340(2) of the NLC — fraud, misrepresentation, forgery, insufficient or void instrument. The fact that the immediate purchaser may have acquired his title or interest in good faith and for valuable consideration is irrelevant and of no avail. So long as any of the vitiating factors are established on the evidence, the immediate purchaser's title or interest in the land is liable to be set aside (see Tan Ying Hong [2010]; Kamarulzaman*

Omar & Ors v. Yakub Husin & Ors [2014]; Samuel Naik Siang Ting v. Public Bank Berhad [2015]; He-Con Sdn Bhd v Bulyah Ishak & Anor [2020]).

[68] If, however, the facts show that the purchaser is a subsequent purchaser, then the law applicable is the proviso to sub-s 340(3) of the NLC. This means that a subsequent purchaser's title or interest in the land is also not indefeasible if it can be shown that he was not a purchaser in good faith and for valuable consideration; put another way, if the subsequent purchaser is not a bona fide purchaser for value, then his title or interest in the land may be set aside. If however, the subsequent purchaser is a purchaser in good faith and for valuable consideration, then his title or interest in the land will become indefeasible under the proviso to sub-s 340(3) of the NLC (see *T Sivam Tharamalingam* [2018]); *CIMB Bank Bhd* [2017]; *Liputan Simfoni* [2018]; *Puspaleela R Selvarajah* [2019]). (Emphasis added.)

[70] Premised on *See Leong Chye*, the sixth and seventh defendants were immediate co-purchasers of the land and upon the MOT's registration (27 October 2004):

(1) the registered title (sixth and seventh defendants) had deferred indefeasibility (not immediate indefeasibility); and

(2) the registered title (sixth and seventh defendants) can only be defeasible upon proof of any one of the exceptions (s 340(2) of the NLC) by the plaintiffs.

J. EXCEPTION (S 340(2)(A) NLC)

J(1) Misrepresentation

[71] In this case the plaintiffs did not rely on 'misrepresentation' under s 340(2)(a) of the NLC to render defeasible the registered title (sixth and seventh defendants). Accordingly, there is no necessity for us to decide on whether 'misrepresentation' in s 340(2)(a) of the NLC is a separate ground from 'fraud' in that provision and if so, whether 'misrepresentation' in s 340(2)(a) of the NLC includes 'negligent misrepresentation', 'innocent misrepresentation' and/or misrepresentation as defined in s 18(a) to (c) of the Contracts Act 1950 ('the CA (1950)').

J(2) Fraud

[72] We are of the following view regarding the application of 'fraud' in s 340(2)(a) of the NLC ('fraud exception (s 340(2)(a) of the NLC'):

(1) 'fraud' in s 340(2)(a) of the NLC means 'actual fraud' and not 'equitable fraud' or 'constructive fraud' — please refer to the Federal Court's judgment delivered by Lee Hun Hoe CJ (Borneo) in *Datuk Jagindar Singh & Ors v Tara*

Rajaratnam [1983] 2 MLJ 196, at 200 to 201. Case law has not explained whether there is any relationship between actual fraud in s 340(2)(a) of the NLC and the definition of fraud in s 17(a) to (e) of the CA (1956);

(2) for the first person in whose favour title/interest is registered in the RDT (Y) to challenge successfully the indefeasibility of an immediate purchaser's registered title/interest (Z), there are two scenarios, namely:

(a) Z caused the actual fraud or was involved in the actual fraud (*Z's actual fraud*) which led to the registration of Z's title/interest (*first scenario*); and

(b) the actual fraud was caused by a third party (*third party's actual fraud*) and this then led to the registration of Z's title/interest (*second scenario*);

(3) in the first scenario, if Y can prove Z's actual fraud on a balance of probabilities:

(a) Z's registered title/interest is defeasible pursuant to s 340(2)(a) of the NLC; and

(b) Y can apply to court to:

(i) set aside Z's registered title/interest; and

(ii) reinstate Y's title/interest in the RDT.

(4) for the second scenario:

(a) to set aside Z's registered title/interest, Y must prove the following two matters on a balance of probabilities:

(i) third party's actual fraud; and

(ii) Z was 'party or privy' to third party's actual fraud;

(b) there is no definition of the terms 'party' and 'privy' in NLC;

(c) Z would be a 'party' to third party's actual fraud if Z had taken part in any manner in the third party's actual fraud;

(d) the word 'privy' is defined in *The Shorter Oxford English Dictionary*, Vol 2, at p 1674, as follows, among others (ordinary meaning (privy)):

> ...
>
> 4. *The fact of being privy to something; participation in the knowledge of something private or secret, usu. Implying concurrence or consent; private knowledge or cognizance.* (Emphasis added.)

(e) premised on the ordinary meaning (privy):

(i) if Z had actual knowledge of third party's actual fraud prior to the registration of Z's title/interest, Z would be privy to the third party's actual fraud within the meaning of s 340(2)(a) of the NLC; and

(ii) constructive notice or knowledge of third party's actual fraud (*constructive notice/knowledge*) cannot be imputed to Z under s 340(2)(a) of the NLC.

(f) in the Federal Court case of *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85, at 88, Gill CJ (Malaya) has rejected constructive notice/knowledge under our Torrens system as follows:

> It is contended for the appellant that if the respondent had knowledge by his agent of the illegality of the loan transaction and consequently of the transfer by Chooi Mun Sou to the Nominee Company being void, he cannot be a bona fide purchaser. The authority relied on for this contention is the old case of *Le Neve v Le Neve* (1747) Amb 436 26 ER 1172. But *the doctrine of constructive notice, which is all that the respondent can be said to have had in this case, is inapplicable, as a rule, to systems of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration.* (See 14 Halsbury, 3rd Ed para 1023 at p 545). *Where the effect of constructive notice would be to invalidate a transaction in relation to sale of land, the court will not readily apply the doctrine.* (See 14 Halsbury, 3rd Ed para 1022 at p 545). (Emphasis added.)

We have not overlooked the Federal Court's judgment delivered by Azahar Mohamed FCJ (as he then was) in *T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd* [2018] 5 MLJ 711. It is decided in *Sivam Tharamalingam*, at [25] and [92], as follows:

> [25] *This court had granted leave to the plaintiff to bring the present appeal on the following two questions of law*:
>
> (g) question 1:
>
> *Whether knowledge on part of solicitor of claims which amount to encumbrances over a piece of land is imputed back to his client for the purposes of s 340(3) of the NLC? and*
>
> (h) question 2*:*
>
> *Whether the principle in Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 that the doctrine of constructive notice does not apply to the Torrens system in that an agent (solicitor)'s knowledge of fraud cannot be imputed to his client, is correct in law.*
>
> *Whether the principle in Doshi is applicable only where there is fraud on the part of the agent in the matter or also in cases whether the said agent was not complicit in the fraud alleged himself.*
>
> ...

A [92] *In consequence and in view of the above, our answers to the legal issues posed are as follows. In the context of the issues arising in the present appeal as well as the facts of the case, the answer to question 1 is in the affirmative.*

B [93] *Flowing from the above, our answer to question 2 is as follows. The general rule is that the knowledge of a solicitor is regarded by law as the knowledge of the client. An exception to the rule is only admitted where the solicitor is complicit in fraud.* (Emphasis added.)

C The Federal Court in *Sivam Tharamalingam* has only overruled *Doshi* to the following extent:
(i) knowledge of fraud by a party's solicitor (who is not complicit to the fraud) can be imputed to the party; and
(ii) knowledge of fraud by a party's solicitor (who is complicit to the fraud) cannot be imputed to the party.
D Save for the above, *Sivam Tharamalingam* did not overrule the rejection of constructive notice/knowledge in *Doshi*; and

(a) the rejection of constructive notice/knowledge is in consonance with the conclusiveness of RDT principle, indefeasibility of registered title/interest principle, Mirror Principle, Curtain Principle and private caveat procedure. If otherwise:
E

(i) the RDT is no longer conclusive and RDT does not mirror all registered titles/interests and claims (by way of entry of private caveats); and

F (ii) parties have to go beyond land searches and RDT to inquire regarding all proposed dealings of titles/interests. In other words, the Curtain Principle is no longer applicable.

[73] Firstly, this case did not concern the first scenario, ie, the sixth and seventh defendants did not commit actual fraud against the plaintiffs which G caused the registration of the title (sixth and seventh defendants).

[74] Secondly, this case concerned the second scenario. With regard to the land, fraud (first to fifth defendants) had been committed against the plaintiffs, H especially in view of the fact that the first to fifth defendants had not applied to court to set aside the default judgment (first to fifth defendants).

[75] Thirdly, we are of the view that the learned JC had made an error of law in failing to decide the question of whether the sixth and seventh defendants I were parties or privy to the fraud (first to fifth defendants) within the meaning of s 340(2)(a) of the NLC ('third legal error').

[76] Fourthly, the plaintiffs had not adduced any evidence to prove that the plaintiffs were parties to the fraud (first to fifth defendants).

[77] Fifthly, we decide that the sixth and seventh defendants had no actual knowledge of the fraud (first to fifth defendants) before MOT's registration (27 October 2004). This is clear from the following evidence and reasons which proved that the sixth and seventh defendants were not privy to the fraud (first to fifth defendants):

(1) the sixth defendant came across the sale banner (land) and contacted DW5, a real estate negotiator attached to LMCR. LMCR had been appointed by the first defendant to sell the land;

(2) DW1 was a potential purchaser of the land. It was clear that the purchase of the land by the sixth and seventh defendants was not contrived;

(3) the sixth and seventh defendants appointed an A&S, DW2, to:

(a) conduct the necessary KL land office search regarding the land;

(b) do a SSM search of the first defendant;

(c) contact DW4, an A&S who prepared the PA;

(d) obtain from DW4 a certified true copy of the PA and documentary proof of deposit of the PA in KL HC and land office;

(e) prepare the SPA and MOT for the purchase of the land;

(f) take possession of the original IDT;

(g) obtain a letter dated 13 July 2004 from the first defendant which enclosed the following documents, among others:

(i) certified true copies of the first defendant's MA, AA, Forms 24 and 49; and

(ii) first defendant's resolution which authorised the second and third defendants to sign the SPA and MOT on behalf of the first defendant;

(h) enter the private caveat (sixth and seventh defendants);

(i) send the MOT for adjudication of stamp duty (MOT);

(j) obtain PW4's SD (13 July 2004), first plaintiff's SD (9 November 2004) and first plaintiff's SD (9 November 2004); and

(k) receive the IDT (Form 5BK) from the land office;

(4) the sixth and seventh defendants paid the following sums of money:

(a) the full purchase price of RM750,000;

(b) the stamp duty (MOT);

(c) the outstanding quit rent;

(d) the penalty (land office); and

(e) the outstanding assessment rate;

(5) the sixth and seventh defendants spent more than RM2m to demolish the existing two-storey bungalow on the land and built a new bungalow with a swimming pool;

(6) the sixth and seventh defendants moved into the property on 8 August 2006 and have resided at the property ever since. No person who is privy to a fraud, would stay in a property which has been acquired by way of the fraud; and

(7) the two demands (Messrs KC) did not allege that fraud had been committed by the sixth and seventh defendants on the plaintiffs and PW4. Nor did the two demands (Messrs KC) aver that the sixth and seventh defendants were privy to the fraud (first to fifth defendants).

[78] Sixthly, in view of the evidence and reasons as stated in the above para 77, we are not persuaded that the plaintiffs have discharged the legal and evidential burdens to prove on a balance of probabilities that the sixth and seventh defendants were privy to the fraud (first to fifth defendants).

[79] Seventhly, this case is peculiar because the plaintiffs and PW1 were guilty of, among others, inordinate delay and questionable conduct ('inordinate delay/questionable conduct (plaintiffs/PW1)'). The inordinate delay/questionable conduct (plaintiffs/PW1) is proven by the following evidence and reasons:

(1) the plaintiffs handed the original IDT to PW1 and allowed PW1 to hand over the original IDT to the fourth defendant as security for the friendly loan (second and third defendants) when there was no documentation regarding the friendly loan (second and third defendants);

(2) there was no documentation of the handing over of the original IDT by PW1 to the second, third and/or fourth defendants;

(3) the plaintiffs executed the PA in favour of the first defendant despite the fact that the plaintiffs had been previously informed that the original IDT was a security for the friendly loan (second and third defendants) and not for a loan by the first defendant;

(4) the MOA (plaintiffs-first defendant) was material evidence to support the original action that the plaintiffs had been defrauded by the first to

fifth defendants regarding the sale of the land by the plaintiffs to the first defendant. The MOA (plaintiffs-first defendant) was however not adduced as evidence by the plaintiffs in this case. No reasonable explanation was given by the plaintiffs and PW4 on why the MOA (plaintiffs-first defendant) could not adduced as evidence at the trial.

(5) the learned JC should have drawn an adverse inference under s 114(g) of the Evidence Act 1950 ('the EA') against the plaintiffs for their suppression of MOA (plaintiffs-first defendant) as evidence at the trial — please refer to the Supreme Court's judgment delivered by Mohd Azmi SCJ in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, at 494. Section 114(g) of the EA states as follows:

> 114 Court may presume existence of certain fact
>
> *The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct,* and public *and private business, in their relation to the facts of the particular case.*
>
> *ILLUSTRATIONS*
>
> *The court may presume —*
>
> ...
>
> (g) *that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it ...* (Emphasis added.)

(6) PW4's SD (13 July 2004), first plaintiff's SD (9 November 2004) and first plaintiff's SD (25 November 2004) (collectively referred to in this judgment as the 'three SDs') were affirmed before CFOs. There was no allegation by the first plaintiff and PW4 that:

(a) the first plaintiff and PW4 had been deceived or coerced to affirm the three SDs before CFOs; or

(b) the contents of the three SDs were false;

(7) in view of the contents of the first defendant's letter (12 January 2005), when the balance purchase price (plaintiffs) was not paid by the first defendant to the plaintiffs on 12 April 2005, the plaintiffs could and should have:

(a) terminated the MOA (plaintiffs-first defendant); and

(b) demanded the immediate return of the original IDT;

(8) in the first place, PW4 and plaintiffs should not have accepted the first defendant's post-dated cheque (12 July 2005). When a purchaser of land provides a post-dated cheque for payment of balance purchase price of the land, this would have raised a red flag to the vendor of the land

regarding the purchaser's lack of financial capability to complete the sale. In such an event, a prudent vendor should have refused to proceed with the sale of the land;

(9) when PW4 was informed by the fourth defendant that the first defendant had no money to honour the first defendant's post-dated cheque (12 July 2005), the plaintiffs should have terminated the MOA (plaintiffs-first defendant) and demanded the immediate return of the original IDT;

(10) PW4 and plaintiffs should not have waited for the expiry of the six-month validity period of the first defendant's post-dated cheque (12 July 2005). Nor should PW4 and plaintiffs have waited until PW4 could not contact the fourth defendant. No reasonable vendor of land would have waited in abject silence for such an inordinate length of time for payment of the balance purchase price of the land;

(11) the plaintiffs did not pay the outstanding quit rent and outstanding assessment rate. In fact, the plaintiffs had left their bungalow on the land in a state of disrepair. It is thus clear that the plaintiff had no intention to re-occupy the land, let alone to claim for its lawful return;

(12) when the sixth and seventh defendants applied to ROT to remove the fourth plaintiff's private caveat (4 January 2008), inexplicably, the fourth plaintiff did not apply to HC under s 326(2) of the NLC to extend the effective period of the fourth plaintiff's private caveat (4 January 2008);

(13) confoundingly, the plaintiffs did not appeal to the HC under s 418(1) of the NLC against ROT's removal of fourth plaintiff's private caveat (2 April 2009);

(14) no demand was ever served on the sixth and seventh defendants by Messrs KC A bona fide claimant of land would have immediately served a demand on the person who has unlawfully acquired title to the land and is occupying the same;

(15) despite the fact that the two demands (Messrs KC) were served on the first to fifth defendants on 19 December 2007, the plaintiffs only filed the original action on 16 April 2013. There was therefore an inordinate delay in the filing of the original action by the plaintiffs;

(16) the writ and SOC were never served by the plaintiffs on the sixth and seventh defendants;

(17) the default judgment was obtained by the plaintiffs on 1 July 2013. However, the plaintiffs' title (default judgment) was only registered on 13 November 2017, a delay of more than four years and four months from the date of the default judgment;

(18) the plaintiffs did not serve the default judgment on the sixth and seventh defendants;

(19) despite having obtained the default judgment, the plaintiffs did not apply to court for a writ of possession to compel the sixth and seventh defendants to deliver possession of the land to the plaintiffs; and

(20) in view of the reasons explained in the above sub-paras (15) to (18), this court accepts the submission by learned counsel for the sixth and seventh defendants that before the sixth and seventh defendants applied to set aside the default judgment, the plaintiffs were planning stealth moves to transfer the land registered in their names to other parties for valuable consideration without giving prior notice to the sixth and seventh defendants. The plaintiffs and PW1 lacked bona fides in this case.

[80] The evidence and reasons stated in the above paras 76, 77 and 79 clearly distinguish this case from all decided cases cited by the plaintiffs' learned counsel and the cases referred to by the learned JC in the GOJ.

K. FORGERY EXCEPTION (S 340(2)(b) OF THE NLC)

[81] In this case, the plaintiffs admitted that they had signed the PA on their own volition. As such, there is no room for the plaintiffs to invoke the forgery exception (s 340(2)(b) of the NLC) in the instant case.

L. INSUFFICIENT/VOID INSTRUMENT EXCEPTION (S 340(2)(b) OF THE NLC)

[82] Firstly, our case law had not decided whether an 'insufficient' instrument is a ground under s 340(2)(b) of the NLC to render defeasible a registered title/interest which is independent of 'void' instrument in that provision. Nor has case law explained when an instrument is 'insufficient' for the purpose of s 340(2)(b) of the NLC.

[83] Secondly, we are of the view that an instrument to register a dealing regarding title/interest is void under s 340(2)(b) of the NLC if the dealing is prohibited by written law. This concerns an interpretation of the written law in question so as to ascertain whether the legislature has intended to prohibit the dealing in the written law. A good example is when a land dealing is in fact an unlicensed moneylending transaction which contravenes the Moneylenders Act 1951. In such a case, the registration of the dealing by way of the instrument is void pursuant to s 340(2)(b) of the NLC — please refer to the High Court's judgment in *Yeow Guang Cheng v Tang Lee Hiok & Ors* [2020] MLJU 1936, at [43].

L(1) Whether plaintiffs can rely on causes of action (invalid SPA/insufficient and void MOT)

[84] It is trite law that parties are bound by their pleadings — please refer to the Federal Court's judgment delivered by Ramly Ali FCJ in *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944, at [27] to [34].

[85] The SOC did not plead the causes of action (invalid SPA/insufficient and void MOT). Paragraph 3 RDDCC had pleaded the causes of action (invalid SPA/insufficient and void MOT). We have no hesitation to decide that the plaintiffs could not rely on para 3 RDDCC to justify their reliance in this case on the causes of action (invalid SPA/insufficient and void MOT). Our reasons are as follows:

(1) the functions of RDDCC are merely to:

(a) reply to the defence of the sixth and seventh defendants; and

(b) defend against the counterclaim.

The plaintiffs could not introduce the causes of action (invalid SPA/insufficient and void MOT) in the RDDCC. This is clear from the following judgment of Vazeer Alam JCA in the Court of Appeal case of *Khazanah Jaya Sdn Bhd v Hisco (M) Sdn Bhd* [2022] 5 MLJ 744, at [43]:

> [43] *The function of a reply in the overall scheme of pleadings in a civil action was considered and well expressed by the Singapore Court of Appeal in Romar Positioning Equipment Pte Ltd v Merriwa Nominees Pty Ltd [2004] SGCA 44; [2004] 4 SLR 574 , where the court held:*
>
> > *It bears remembering that the function of a reply is to allow the plaintiff to raise facts in answer to the defendant's case. In particular, it will be necessary to file a reply if the defendant raises a new issue for the first time in the defence. As the function of a reply is limited to answering matters raised in the defence, it follows that the reply should not be used as an avenue to introduce new causes of action which are not raised in the statement of claim. If a plaintiff wishes to raise an additional and inconsistent claim in the alternative after the statement of claim has been filed, the proper approach should be to apply to amend the statement of claim, rather than slip it in by way of the reply.* (Emphasis added.)

(2) O 20 rr 5(1) and 8(1) state as follows:

> Amendment of *writ or* pleading with leave
>
> O 20 r 5(1) Subject to Order 15, rules 6, 6A, 7 and 8 *and the following provisions of this rule, the Court may at any stage of the proceedings allow* the plaintiff to amend his writ, or *any party to amend his pleading*, *on such terms as to costs or otherwise as may be just and in such a manner, if any, as it may direct*.

Amendment of certain other documents

O 20 r 8(1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner, if any, as it may direct. (Emphasis added.)

If the plaintiffs wish to rely on the causes of action (invalid SPA/insufficient and void MOT), before the commencement of trial the plaintiffs should have applied to court under O 20 rr 5(1) and 8(1) of the RC for leave of court to amend the SOC so as to include a pleading regarding the causes of action (invalid SPA/insufficient and void MOT). The plaintiffs however did not do so. Accordingly, the plaintiffs cannot now be allowed to circumvent the requirements of O 20 rr 5(1) and 8(1) of the RC (to apply for leave of court to amend the SOC) by relying on RDDCC.

[86] There are two additional reasons why the learned JC should not have allowed the plaintiffs to rely on the causes of action (invalid SPA/insufficient and void MOT) in this case, namely:

(1) the causes of action (invalid SPA/insufficient and void MOT) were not stated in the summary (plaintiffs' case). The plaintiffs did not apply to court for leave pursuant to O 20 r 8(1) of the RC to amend the summary (plaintiffs' case) so as to include the causes of action (invalid SPA/insufficient and void MOT); and

(2) the plaintiffs' two issues to be tried did not allude to the causes of action (invalid SPA/insufficient and void MOT). The plaintiffs did not seek the court's leave under O 20 r 8(1) of the RC to add questions regarding the causes of action (invalid SPA/insufficient and void MOT) in the plaintiffs' two issues to be tried.

[87] In view of the reasons expressed in the above paras 84 to 86, the learned JC had erred in law by allowing the plaintiffs to rely on the causes of action ('invalid SPA/insufficient and void MOT) (*fourth legal error*').

L(2) Could first defendant dispute authority of second and third defendants to sign SPA and MOT on first defendant's behalf?

[88] It is clear that the first defendant could not have disputed the authority of second and third defendants to sign SPA and MOT on behalf of the first defendant because:

(1) the first defendant's resolution had authorised the second and third defendants to sign the SPA and MOT on behalf of the first defendant; and

(2) the first defendant's common seal had been affixed on the SPA and MOT.

With respect, the learned JC committed a legal error when she omitted to take into account the above reasons (fifth legal error).

L(3) Whether sixth and seventh defendants can rely on Indoor Management Rule

[89] In respect of the land, the sixth and seventh defendants were bona fide third parties who had dealt with the first defendant without any actual knowledge of the fraud (first to fifth defendants) — please refer to the above paras 76 and 77. Consequently, in this case the sixth and seventh defendants can rely on the Indoor Management Rule or the Rule in *Turquand*'s case to assume that the second and third defendants had been authorised by the first defendant to sign the SPA and MOT on the first defendant's behalf. In *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189; [1992] 1 CLJ Rep 120, at 128, Mohd Azmi SCJ has delivered the following judgment of the Supreme Court:

> Further, *the principle laid down in Royal British Bank v Turquand [1856] 6 E & B 327 is that a person dealing with a company does not need to enquire into the regularity in the internal affairs and proceedings of the company, and may assume that all being done regularly.* (Emphasis added.)

The failure of the learned JC to apply the Indoor Management Rule in this case, constituted an error of law (*sixth legal error*).

L(4) Were sixth and seventh defendants required by law to inquire on whether second and third defendants had actual authority from first defendant to sign SPA and MOT on first defendant's behalf?

[90] As explained in the above sub-paras 72(4)(a) to (g), under our Torrens system, for the purpose of the second scenario under s 340(2)(a) of the NLC, constructive notice/knowledge cannot be imputed to the sixth and seventh defendants regarding the authority of the second and third defendants to execute the SPA and MOT on the first defendant's behalf. Consequently, the sixth and seventh defendants were not required by NLC and our case law to inquire on:

(1) whether the second and third defendants had actual authority from the first defendant to sign the SPA and MOT on behalf of the first defendant; and

(2) whether the second and third defendants were directors of the first defendant when they executed the SPA and MOT on the first defendant's behalf.

L(5) Could HC rely on PW5's opinion?

[91] The effect of NLC and CA (1965) is a matter for the court to interpret and apply the NLC and CA (1965). No witness, including an A&S, can testify under oath what is his or her opinion regarding the effect of NLC and CA (1965). There was a clear error of law when the learned JC accepted PW5's opinion regarding the effect of NLC and CA (1965) (*seventh legal error*).

L(6) Could plaintiffs invalidate PA, SPA and MOT?

[92] Firstly, the PA was duly executed and deposited in accordance with PAA. There was no question that the PA was valid under PAA and could not be invalidated by the mere fact that the second and third defendants were not directors of the first defendant when they signed the SPA and MOT on the first defendant's behalf.

[93] It is our considered view that the SPA and MOT were valid due to the following reasons:

(1) as explained in the above Part L(2), the first defendant could not dispute the authority of the second and third defendants to execute the SPA and MOT on behalf of the first defendant; and

(2) the sixth and seventh defendants were not required by law to inquire on whether the second and third defendants were the first defendant's directors when they executed the SPA and MOT on behalf of the first defendant — please refer to the above Part L(4).

[94] In view of the above reasons, the PA, SPA and MOT are valid and there cannot be any room to nullify the SPA and MOT under the insufficient/void instrument exception (s 340(2)(b) of the NLC)).

M. WAS ORIGINAL ACTION TIME-BARRED?

[95] We reproduce below the relevant parts of ss 6(1)(a) and 9 of the LA:

> 6 *Limitation of actions of* contract and *tort* and certain other actions
>
> (1) *Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —*
>
> (a) *actions founded* on a contract or *on tort* ...

A *9 Limitation of actions to recover land*

(1) *No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him*, or if it first accrued to some person through whom he claims, to that person. (Emphasis added.)

B

[96] We are unable to accede to the submission by learned counsel for the sixth and seventh defendants that the original action is time-barred in this case. Our reasons are as follows:

C (1) one of the remedies sought in the original action is recovery of the land. Hence, the 12-year limitation period to recover land as provided in s 9(1) of the LA, applies to the original action;

(2) the SOC had pleaded on, among others, the tort of fraud. Having said D that, the six-year limitation period in s 6(1)(a) of the LA is subject to s 9(1) of the LA. This is clear from the words 'Save as hereinafter provided' in s 6(1) of the LA; and

(3) the original action was filed on 16 April 2013 and this was well within E the 12-year limitation period which commenced from MOT's registration (27 October 2004).

N. WAS HC'S DECISION (DAMAGES PAYABLE BY PLAINTIFFS TO SIXTH AND SEVENTH DEFENDANTS) LAWFULLY MADE?

F

[97] Sections 38(1) and 40 of the SRA provide as follows:

S 38 When cancellation may be ordered.

(1) *Any person against whom a written instrument is void or voidable, who has* G *reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.*

Power to require party for whom instrument is cancelled to make compensation.

H S 40 *On adjudging the cancellation of an instrument, the court may require the party to whom the relief is granted to make any compensation to the other which justice may require.* (Emphasis added.)

I **[98]** As explained in the above Parts J(1), J(2), L and L(1) to L(6), the MOT was valid. Consequently, the learned JC had no discretionary power under s 38(1) of the SRA to cancel the MOT. Nor could the HC's decision (damages payable by plaintiffs to sixth and seventh defendants) be made pursuant to s 40 of the SRA.

O. WHETHER HC SHOULD GRANT DECLARATIONS IN PLAINTIFFS' FAVOUR

[99] We reproduce below s 41 of the SRA and O 15 r 16 of the RC:

> S 41 SRA *Discretion of court as to declaration of* status or *right*
>
> *Any person entitled* to any legal character, or *to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the* character or *right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief*:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.
>
> O 15 r 16 of the RC Declaratory judgment
>
> No action or other proceeding shall be open to objection merely on the ground that a declaratory judgment or order is sought thereby, and *the Court may make binding declarations of right* whether or not consequential relief is or could be claimed. (Emphasis added.)

[100] It is not disputed that the court has a discretion to grant a declaration under s 41 of the SRA and O 15 r 16 of the RC. In this case, the learned JC had granted declarations in favour of the plaintiffs as per Prayer 1 (SOC) to Prayer 5 (SOC) without any consideration of the inordinate delay/questionable conduct (plaintiffs/PW1) — please refer to the above para 79. An exercise of the learned JC's discretion to grant declarations in this case without taking into account the inordinate delay/questionable conduct (plaintiffs/PW1) is tantamount to a legal error ('eighth legal error').

P. CONCLUSION

[101] In view of the first to eighth legal errors, we are constrained to allow this appeal with the following orders:

(1) the HC's decision is set aside;

(2) the original action is dismissed;

(3) the counterclaim is allowed wherein:

(a) a declaration is granted that the registration of the plaintiffs' title (default judgment) is void;

(b) an order which sets aside the transfer of the land from the sixth and seventh defendants to the plaintiffs (which registered the plaintiffs' title (default judgment));

(c) an order that the plaintiffs shall deliver and/or surrender within 30 days from the date of this court's order ('CA's order'):

(i) the plaintiffs' duplicate IDT (default judgment)); and/or

(ii) the plaintiffs' replacement IDT (default judgment).

to the DR who will surrender the plaintiffs' duplicate IDT (default judgment) and/or plaintiffs' replacement IDT (default judgment) to the ROT to be destroyed forthwith;

(d) an order that the ROT shall within 30 days from the date of CA's order expunge from the RDT the registration of the plaintiffs' title (default judgment); and

(e) an order that the ROT and land office shall within 30 days from the date of CA's order reinstate on the RDT the names of the sixth and seventh defendants as the registered co-owners of the land; and

(4) subject to allocatur fee, the plaintiffs shall pay a sum of RM80,000 to the sixth and seventh defendants as costs here and below.

[102] In closing, it is imperative for a person who has been unlawfully deprived of his or her registered title/interest to act expeditiously and apply to court to restore his or her registered title/interest.

High Court's decision set aside; original action dismissed; counterclaim allowed with costs of RM80,000 here and below to be paid by plaintiffs to sixth and seventh defendants subject to allocatur fee.

Reported by Dzulqarnain Ab Fatar